

MONTANA LEGISLATIVE HISTORY

Chapter 392 19 93

Bill H 255 S _____ Original bill & history ☒ c

H. Committee on Judiciary

Hearing Date(s) Jan 22 ☒ C

Feb 2 ☒ C

Feb 4 ☒ C

_____ ☐ C

_____ ☐ C

Date Out Feb 5 ☒ C

S. Committee on Judiciary

Hearing Date(s) Mar 04 ☒ C

Mar 08 ☒ C

_____ ☐ C

_____ ☐ C

Mar 08 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

3/20 TRANSMITTED TO GOVERNOR
 3/24 SIGNED BY GOVERNOR
 CHAPTER NUMBER 153
 EFFECTIVE DATE: 10/01/93

HB 252 INTRODUCED BY BACHINI, ET AL.
 EXEMPT HOMEOWNER FROM BUILDING CODE FEE IF DOING OWN REPAIR
 WORK

1/19 INTRODUCED
 1/20 REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT
 1/20 FIRST READING
 1/20 FISCAL NOTE REQUESTED
 1/25 FISCAL NOTE RECEIVED
 1/25 FISCAL NOTE PRINTED
 1/27 HEARING
 1/27 TABLED IN COMMITTEE

HB 253 INTRODUCED BY D. BROWN
 LOWER DRIVER'S LICENSE REINSTATEMENT FEE TO \$50

1/19 INTRODUCED
 1/20 REFERRED TO JUDICIARY
 1/20 FIRST READING
 1/20 FISCAL NOTE REQUESTED
 1/25 FISCAL NOTE RECEIVED
 1/25 FISCAL NOTE PRINTED
 2/02 TABLED IN COMMITTEE

HB 254 INTRODUCED BY MCCAFFREE
 INCREASE MOTOR VEHICLE LIEN FILING FEE FROM \$4 TO \$8

1/19	INTRODUCED		
1/20	REFERRED TO TAXATION		
1/20	FIRST READING		
1/20	FISCAL NOTE REQUESTED		
1/25	FISCAL NOTE RECEIVED		
1/25	FISCAL NOTE PRINTED		
1/26	HEARING		
1/28	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/01	2ND READING PASSED	55	45
2/03	3RD READING FAILED	47	50
2/04	RECONSIDERED PREVIOUS ACTION	56	38
2/05	3RD READING PASSED	58	40
	TRANSMITTED TO SENATE		
2/08	FIRST READING		
2/08	REFERRED TO LOCAL GOVERNMENT		
3/04	HEARING		
3/10	COMMITTEE REPORT—BILL NOT PASSED		
3/10	ADVERSE COMMITTEE REPORT ADOPTED	44	2

HB 255 INTRODUCED BY ANDERSON
 REVISE RELEASE OR DISCHARGE OF DEFENDANT WHO PLED MENTAL
 DISEASE OR DEFECT
 BY REQUEST OF DEPARTMENT OF CORRECTIONS AND HUMAN SERVICES

1/19 INTRODUCED
 1/20 REFERRED TO JUDICIARY
 1/20 FIRST READING
 1/20 FISCAL NOTE REQUESTED
 1/25 FISCAL NOTE RECEIVED

1/25	FISCAL NOTE PRINTED		
1/27	HEARING		
2/08	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/10	2ND READING PASSED	62	33
2/13	3RD READING PASSED	68	30
	TRANSMITTED TO SENATE		
2/16	FIRST READING		
2/16	REFERRED TO JUDICIARY		
3/04	HEARING		
3/08	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/09	2ND READING CONCURRED	48	0
3/10	3RD READING CONCURRED	46	0
	RETURNED TO HOUSE WITH AMENDMENTS		
3/31	2ND READING AMENDMENTS CONCURRED	92	5
4/02	3RD READING AMENDMENTS CONCURRED	81	18
4/13	SIGNED BY SPEAKER		
4/13	SIGNED BY PRESIDENT		
4/14	TRANSMITTED TO GOVERNOR		
4/19	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 397		
	EFFECTIVE DATE: 04/19/93		

HB 256 INTRODUCED BY TOOLE, ET AL.
REVISE FEE FOR SPECIAL LICENSE PLATES FOR DISABLED VETERANS

1/19	INTRODUCED		
1/20	REFERRED TO HIGHWAYS & TRANSPORTATION		
1/20	FIRST READING		
1/20	FISCAL NOTE REQUESTED		
1/25	FISCAL NOTE RECEIVED		
1/28	FISCAL NOTE PRINTED		
1/29	HEARING		
2/01	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/03	2ND READING PASSED	93	3
2/05	3RD READING PASSED	94	4
	TRANSMITTED TO SENATE		
2/08	FIRST READING		
2/08	REFERRED TO HIGHWAYS & TRANSPORTATION		
3/02	HEARING		
3/05	COMMITTEE REPORT—BILL CONCURRED		
3/06	2ND READING CONCURRED	46	0
3/08	3RD READING CONCURRED	48	0
	RETURNED TO HOUSE		
3/21	SIGNED BY SPEAKER		
3/23	SIGNED BY PRESIDENT		
3/25	TRANSMITTED TO GOVERNOR		
3/29	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 209		
	EFFECTIVE DATE: 01/01/94		

HB 257 INTRODUCED BY TOOLE, ET AL.
MAKE LOCAL GOVERNMENTS LIABLE FOR CAUSING OR CONTRIBUTING
TO PERSONAL INJURY BY FAILING TO DEVELOP METHODS FOR
QUICKLY RESPONDING TO EMERGENCY MEDICAL SITUATIONS

1/19	INTRODUCED
1/20	REFERRED TO JUDICIARY
1/20	FIRST READING
1/20	FISCAL NOTE REQUESTED
1/25	FISCAL NOTE RECEIVED

1 House BILL NO. 255
2 INTRODUCED BY Anderson
3 BY REQUEST OF THE DEPARTMENT OF CORRECTIONS
4 AND HUMAN SERVICES
5
6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE CRITERIA
7 APPLICABLE TO THE CONDITIONAL RELEASE OR DISCHARGE OF A
8 PERSON WHO HAS RELIED UPON THE DEFENSE OF MENTAL DISEASE OR
9 DEFECT; PROVIDING FOR A DIAGNOSIS OF SERIOUSLY
10 DEVELOPMENTALLY DISABLED IN EXAMINATION REPORTS; REVISING
11 THE HEARING PROCEDURE; AMENDING SECTIONS 46-14-206,
12 46-14-301, 46-14-302, 46-14-303, 46-14-304, AND 46-14-312,
13 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."
14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 **Section 1.** Section 46-14-206, MCA, is amended to read:
17 "46-14-206. Report of examination. (1) A report of the
18 examination may must include the following:
19 (a) a description of the nature of the examination;
20 (b) a diagnosis of the mental condition of the
21 defendant, including an opinion as to whether the defendant
22 is seriously mentally ill, as defined in 53-21-102, or is
23 seriously developmentally disabled, as defined in 53-20-102;
24 (c) if the defendant suffers from a mental disease or
25 defect, an opinion as to the defendant's capacity to

1 understand the proceedings against the defendant and to
2 assist in the defendant's own defense;
3 (d) when directed by the court, an opinion as to the
4 capacity of the defendant to have a particular state of mind
5 that is an element of the offense charged; and
6 (e) when directed by the court, an opinion as to the
7 capacity of the defendant, because of a mental disease or
8 defect, to appreciate the criminality of the defendant's
9 behavior or to conform the defendant's behavior to the
10 requirement of the law.
11 (2) If the examination cannot be conducted by reason of
12 the unwillingness of the defendant to participate in the
13 examination, the report must state that fact and must
14 include, if possible, an opinion as to whether the
15 unwillingness of the defendant was the result of mental
16 disease or defect."

17 **Section 2.** Section 46-14-301, MCA, is amended to read:
18 "46-14-301. Commitment upon finding of not guilty by
19 reason of lack of mental state -- hearing to determine
20 release or discharge. (1) When a defendant is found not
21 guilty for the reason that due to a mental disease or defect
22 the defendant could not have a particular state of mind that
23 is an essential element of the offense charged, the court
24 shall order a predisposition investigation in accordance
25 with 46-18-112 and 46-18-113, which must include an

1 investigation of the present mental condition of the
 2 defendant. If the trial was by jury, the court shall hold a
 3 hearing to determine the appropriate disposition of the
 4 defendant. If the trial was by the court, the court may hold
 5 a hearing to obtain any additional testimony it considers
 6 necessary to determine the appropriate disposition of the
 7 defendant. In either case, the testimony and evidence
 8 presented at the trial must be considered by the court in
 9 making its determination.

10 ~~{2}--The court, upon finding that the defendant may not~~
 11 ~~be discharged or released without danger to others, shall~~
 12 ~~order the defendant committed to the custody of the~~
 13 ~~superintendent of the Montana state hospital to be placed in~~
 14 ~~an appropriate institution for custody, care, and treatment.~~

15 (2) The court shall evaluate the nature of the offense
 16 with which the defendant was charged. If the offense:

17 (a) involved a substantial risk of serious bodily
 18 injury or death, actual bodily injury, or substantial
 19 property damage, the court may find that the defendant
 20 suffers from a mental disease or defect that renders the
 21 defendant a danger to the defendant or others. If the court
 22 finds that the defendant presents a danger to the defendant
 23 or others, the defendant may be committed to the custody of
 24 the director of the department of corrections and human
 25 services to be placed in an appropriate mental health

1 facility for custody, care, and treatment. However, if the
 2 court finds that the defendant is seriously developmentally
 3 disabled, as defined in 53-20-102, the prosecutor shall
 4 petition the court in the manner provided in Title 53,
 5 chapter 20.

6 (b) charged did not involve a substantial risk of
 7 serious bodily injury or death, actual bodily injury, or
 8 substantial property damage, the court shall release the
 9 defendant. The prosecutor may petition the court in the
 10 manner provided in Title 53, chapter 20 or 21.

11 (3) A person committed to the custody of the
 12 superintendent director of the department of corrections and
 13 human services shall must have a hearing within 180 days of
 14 confinement to determine the person's present mental
 15 condition and whether the person may must be discharged or
 16 released without danger to others or whether the commitment
 17 may be extended because the person continues to suffer from
 18 a mental disease or defect that renders the person a danger
 19 to the person or others. The hearing must be conducted by
 20 the court--that--ordered--the--commitment--unless--that--court
 21 transfers jurisdiction to the third judicial district court
 22 in the district in which the person has been placed. The
 23 court shall cause notice of the hearing to be served upon
 24 the person, the person's counsel, and the prosecutor, and
 25 the court that originally ordered the commitment. The

hearing is a civil proceeding, and the burden is upon the defendant department of corrections and human services to prove by a--preponderance--of--the clear and convincing evidence that the defendant person may not be safely released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage.

(4) According to the determination of the court upon the hearing, the defendant person must be discharged or released on conditions the court determines to be necessary or must be committed to the custody of the superintendent-of-the-Montana-state-hospital director of the department of corrections and human services to be placed in an appropriate institution mental health facility for custody, care, and treatment.

(5) A professional person shall review the status of the person each year. At the time of the annual review, the director of the department of corrections and human services or the person or the representative of the person may petition for discharge or release of the person. Upon request for a hearing, a hearing must be held pursuant to the provisions of subsection (3)."

Section 3. Section 46-14-302, MCA, is amended to read:

"46-14-302. Discharge or release upon motion of superintendent director. (1) If the superintendent-of-the-Montana--state--hospital director of the department of corrections and human services believes that a person committed to the superintendent's director's custody under 46-14-301 may be discharged or released on condition without danger to the person or others because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage, the superintendent director shall make application for the discharge or release of the person in a report to the district court by-which-the-person was--committed in the district in which the person has been placed and shall send a copy of the application and report to the prosecutor of the county from which the defendant person was committed and to the court that originally committed the person.

(2) The county attorney and the judge who originally committed the person may transmit to the court statements of their reasons for requesting or granting the original commitment and shall transmit the statements within 7 days if requested to do so by the presiding court. The county attorney and the judge who originally committed the person

1 must be given the opportunity to request a hearing on the
 2 requested release of the person and to appear at the
 3 hearing.

4 (3) Either the director of the department of
 5 corrections and human services or the person may also make
 6 application to the court for discharge or release as part of
 7 the person's annual treatment review.

8 (2)(4) The court shall then appoint at least two
 9 persons one person who are is either a qualified
 10 psychiatrists psychiatrist or licensed clinical
 11 psychologists psychologist to examine the person and to
 12 report their-opinion as to the person's mental condition
 13 within 60 days or a longer period that the court determines
 14 to be necessary for the purpose. To facilitate the
 15 examinations and the proceedings on the examinations, the
 16 court may have the person confined in any institution mental
 17 health facility located near the place where the court sits
 18 that may be designated by the superintendent-of-the-Montana
 19 state-hospital director of the department of corrections and
 20 human services as suitable for the temporary detention of
 21 irresponsible persons suffering from mental disease or
 22 defect.

23 (5) The committed person or the person's attorney may
 24 secure a professional person of the committed person's
 25 choice to examine the committed person and to testify at the

1 hearing. If the person wishing to secure the testimony of a
 2 professional person is unable to do so because of financial
 3 reasons, the court shall appoint an additional professional
 4 person to perform the examination. Whenever possible, the
 5 court shall allow the committed person or the person's
 6 attorney a reasonable choice of an available professional
 7 person qualified to perform the requested examination. The
 8 professional person must be compensated by the department of
 9 corrections and human services.

10 (3)(6) If the court is satisfied by the report filed
 11 under subsection (1) and the testimony of the reporting
 12 psychiatrist or licensed clinical psychologist that the
 13 committed person may be discharged or released on condition
 14 without-danger-to-the-person-or-others because the person no
 15 longer suffers from a mental disease or defect that causes
 16 the person to present a substantial risk of serious bodily
 17 injury or death to the person or others, of an imminent
 18 threat of physical injury to the person or others, or of
 19 substantial property damage, the court shall order the
 20 person's discharge or release on conditions that the court
 21 determines to be necessary.

22 (4)(7) If the court is not satisfied, it shall promptly
 23 order a hearing to determine whether the person may safely
 24 be discharged or released on the grounds that the person no
 25 longer suffers from a mental disease or defect that causes

the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage. A hearing is considered a civil proceeding, and the burden is upon the committed--person state to prove by a--preponderance--of--the clear and convincing evidence that the person may not be safely be discharged or released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage. According to the determination of the court upon the hearing, the committed person must then be discharged or released on conditions that the court determines to be necessary or must be recommitted to the custody of the superintendent-of-the-Montana-state--hospital director of the department of corrections and human services, subject to discharge or release only in accordance with the procedures provided in this section and 46-14-303."

Section 4. Section 46-14-303, MCA, is amended to read:

"46-14-303. Application for discharge or release by committed person. A committed person may make application for discharge or release to in the district court by--which the--person--was--committed, in the district in which the

person has been placed, and the procedure to be followed upon the application is the same as that prescribed in 46-14-302 in the case of an application by the superintendent-of-the-Montana-state-hospital director of the department of corrections and human services. However, an application by a committed person need not be considered until the person has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for the person's release or discharge."

Section 5. Section 46-14-304, MCA, is amended to read:

"46-14-304. Recommitment----after Revocation of conditional release. (1) If--within--5--years--after--the conditional--release--of--a--committed--person The court may order revocation of a person's conditional release if the court determines after hearing evidence that:

(a) the conditions of release have not been fulfilled; and

(b) that-for-the-safety-of-the-person-or-for-the-safety of--others--the--person's--conditional--release--should---be revoked, based on the violations of the conditions and the person's past mental health history, there is a substantial

likelihood that the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage.

(2) The court may retain jurisdiction to revoke a conditional release for no longer than 5 years.

(3) If the court finds that the conditional release should be revoked, the court shall immediately order the person to be recommitted to the custody of the superintendent-of-the-Montana-state-hospital director of the department of corrections and human services, subject to discharge or release only in accordance with the procedures provided in 46-14-302 and 46-14-303."

Section 6. Section 46-14-312, MCA, is amended to read:

"46-14-312. Sentence to be imposed. (1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in 46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not

apply and the court shall sentence the defendant to be committed to the custody of the director of the department of corrections and human services to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) Either the director or a defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that:

(a) the defendant no longer suffers from a mental disease or defect;

(b) the defendant's mental disease or defect no longer renders him the defendant unable to appreciate the criminality of his the defendant's conduct or to conform his the defendant's conduct to the requirements of law; or

(c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others; or

(c)(d) the defendant suffers from a mental disease or defect that makes him the defendant a danger to himself the defendant or others, but either:

1 (i) there is no treatment available for his the mental
2 disease or defect;

3 (ii) or-he the defendant refuses to cooperate with
4 treatment; or

5 (iii) the defendant will no longer benefit from active
6 inpatient treatment for the mental disease or defect.

7 (4) The sentencing court may make any order not
8 inconsistent with its original sentencing authority except
9 that the length of confinement or supervision must be equal
10 to that of the original sentence. The professional person
11 shall review the defendant's status each year."

12 NEW SECTION. **Section 7.** Effective date. [This act] is
13 effective on passage and approval.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for HB0255, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION: An act revising the criteria applicable to the conditional release or discharge of a person who has relied upon the defense of mental disease or defect; providing for a diagnosis of seriously developmentally disabled in examination reports; revising the hearing procedure; amending sections; and providing an immediate effective date.

ASSUMPTIONS:

1. Currently, 9 persons are committed to Montana State Hospital as not guilty by reason of mental disease.
2. Each person could request an examination annually at an estimated total cost of \$4,500 per year.
3. The estimated cost can be absorbed in the current budget.

FISCAL IMPACT: No fiscal impact.

David Lewis 1-25-93
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

Shiell Anderson 1-25-93
SHIELL ANDERSON, PRIMARY SPONSOR DATE

Fiscal Note for HB0255, as introduced

HB 255

COMMITTEE--HOUSE JUDICIARY

Page 3

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE - REREFERRED - DATE READ

HB0234	TOOLE, HOWARD		UNIFORM FOREIGN-MONEY CLAIMS ACT				
	1/19	1/28		DO PASS	1/28	VOTE: 18-0	2/01
HB0235	TOOLE, HOWARD		UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT				
	1/19	1/28		DO PASS	1/28	VOTE: 18-0	2/01
HB0236	TOOLE, HOWARD		IMMUNITY FOR PROVIDER OF HEALTH CARE INFORMATION PURSUANT TO WRITTEN RELEASE				
	1/19	1/28		PASS AS AMENDED	2/9	VOTE: 17-1	2/11
HB0245	KADAS, MIKE		ESTABLISH GROUNDS FOR TERMINATION OF MOBILE HOME TENANCY				
	1/19				N/A	VOTE:	BUSINESS & LABOR
HB0253	BROWN, DAVE		LOWER DRIVER'S LICENSE REINSTATEMENT FEE TO \$50				
	1/20			TABLED ON	02/02	VOTE: 18-0	
HB0255	ANDERSON, SHIELL		REVISE RELEASE OR DISCHARGE OF DEFENDANT WHO PLED MENTAL DISEASE OR DEFECT				
	1/20	1/27		PASS AS AMENDED	2/4	VOTE: 18-0	2/08
HB0257	TOOLE, HOWARD		LOCAL GOV'T LIABILITY FOR FAILURE TO HAVE EMERGENCY MEDICAL AID PLAN				
	1/20	1/27		TABLED ON	02/02	VOTE: 15-3	
HB0258	TOOLE, HOWARD		DEDUCTION FROM INTERIM EARNINGS DEDUCTION FROM WRONGFUL DISCHARGE AWARD				
	1/20	1/29		PASS AS AMENDED	2/3	VOTE: 9-7	2/05
HB0267	CLARK, ROBERT		ESTABLISH INDIVIDUAL LICENSURE PURSUANT TO FEDERAL GUN-FREE SCHOOLS ACT				
	1/20	1/28		TABLED ON	02/03	VOTE: 13-5	
HB0272	RICE, JIM		DEPT. BILL WITH TECHNICAL GAMBLING LAW CHANGES				
	1/21	2/03		DO PASS	2/3	VOTE: 18-0	2/05
HB0282	WHALEN, TIM		REVISE JOINT AND SEVERAL LIABILITY				
	1/20	1/29		TABLED ON	02/05	VOTE: 13-5	
HB0307	DEBRUYCKER, ROGER		ALLOW DEPT. JUSTICE TO ADOPT NEW AMUSEMENT GAMES BY RULE				
	1/22	2/03		PASS AS AMENDED	2/3	VOTE: 18-0	2/05

MINUTES

MONTANA HOUSE OF REPRESENTATIVES 53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By RUSSELL FAGG, CHAIRMAN, on January 27, 1993,
at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Dave Brown Vice Chairman(D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Karyl Winslow (R)
Rep. Diana Wyatt (D)

Members Excused: Rep. Randy Vogel, Vice Chairman

Members Absent: None.

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 257, HB 255, SB 19
Executive Action: SB 64, HB 187, SB 12

HEARING ON HB 255

Opening Statement by Sponsor:

REP. SHIELL ANDERSON, HD 81, Livingston. A BILL FOR AN ACT
ENTITLED: "AN ACT REVISING THE CRITERIA APPLICABLE TO THE
CONDITIONAL RELEASE OR DISCHARGE OF A PERSON WHO HAS RELIED UPON
THE DEFENSE OF MENTAL DISEASE OR DEFECT; PROVIDING FOR A

DIAGNOSIS OF SERIOUSLY DEVELOPMENTALLY DISABLED IN EXAMINATION REPORTS; REVISING THE HEARING PROCEDURE; AMENDING SECTIONS 46-14-206, 46-14-301, 46-14-302, 46-14-303, 46-14-304, AND 46-14-312, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

REP. ANDERSON stated the purpose and intent of the bill is explained further in the proponent's testimony. EXHIBITS 1, 2, and 3

Proponents' Testimony:

Kimberly A. Kradolfer, Assistant Attorney General. EXHIBIT 4

Dan Anderson, Dept. of Corrections and Human Services, Mental Health Division. EXHIBIT 5

Opponents' Testimony: None.

Questions From Committee Members and Responses:

REP. HOWARD TOOLE asked Ms. Kradolfer if the judge makes the decision based on the person's condition. Whether acquitted or found not guilty by reason of insanity or mental disease or defect, the courts will establish two facts: 1) that the defendant committed a criminal offense, and 2) the act was committed because of mental illness.

REP. JIM RICE asked Ms. Kradolfer what happens to someone who is found guilty of a crime because of mental defect. Is there an annual treatment or review, and is anyone placed in Warm Springs? Ms. Kradolfer said we have created a massive procedure for each single person placed in Warm Springs. These procedures are required under Foucha vs. Louisiana.

REP. TOOLE referred to Section 46-14-312 and asked if this is supposed to happen. Ms. Kradolfer said that we are dealing with someone who committed a crime. The annual review is for the court to decide whether the person should be on probation or in prison. REP. TOOLE said the statute deals with a convicted person, not someone guilty by reason of mental defect. This section is different from the rest of the statute.

CHAIRMAN FAGG asked if it is necessary that we enact this legislation upon passage. As a general rule, the legislature does not like to do that because the codes are not printed until October, and there's no notice to people out in Montana as to the law changes. He asked if it is necessary in this case? Ms. Kradolfer said yes because there are nine people in the state hospital which should not be there. The state could be potentially liable for keeping them there when the Fusha decision has been handed down. Since it only affects these nine people, and since the hospital and the department would be aware of passage of this bill, it will allow them to leave with bill in hand, effective upon passage and to start having hearings

immediately. CHAIRMAN FAGG asked if the Attorney General's office represents the state in these proceedings. Ms. Kradolfer said that is the responsibility of the State Department of Corrections' counsel.

REP. RICE said the bill is designating District Courts to hold these hearings. Ms. Kradolfer said that past practice has been that the person is taken across the state to where the defendant was charged. It seems more efficient to have the trial in the location where the patient is located.

Closing by Sponsor:

REP. ANDERSON stated HB 255 is a necessary bill to avoid lawsuits. It provides adequate safeguards to protect people from harm and also to protect the rights of the mentally ill.

HEARING ON SB 19

Opening Statement by Sponsor:

SENATOR CHET BLAYLOCK, Senate District 43, Laurel. A bill for an act entitled: ("AN ACT LIMITING THE EXEMPTIONS FROM THE WRONGFUL DISCHARGE FROM EMPLOYMENT ACT; AMENDING SECTION 39-2-912, MCA; AND PROVIDING AN EFFECTIVE DATE.")

SEN. BLAYLOCK said this bill is directed to those employees who feel they were wrongfully discharged. A collective bargaining agreement does not add a just cause in a grievance of arbitration. It is not intended to change the intent of the current law.

Proponents' Testimony:

Phil Campbell, Montana Education Association, said the bill should have a just cause resolution. If not in the contract, the employer can go to court. This does not affect teachers.

Terry Minow, Montana Federation of Teachers, stated the bill mainly affects "classified" employees, i.e. kitchen help, janitorial help and administrative help. Ms. Minow believes that if legal help does not provide for just cause by arbitration, and without that remedy, they are wrongfully discharged.

Opponents' Testimony:

Bruce W. Moerer, Montana School Board Association, said he strongly opposes this bill and challenges the reason that classified school employees don't have any appeal from a school board attorney. That is incorrect. He said right now a classified school employee can appeal termination to the county superintendent of schools like other types of school controversies. This bill has been designed strictly to give them

HOUSE OF REPRESENTATIVES

Judiciary

COMMITTEE

ROLL CALL

DATE

1-27-93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair			✓
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow	✓		
Rep. Diana Wyatt	✓		

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Supreme Court
Opinions

May 19, 1992

THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C.

Volume 60, No. 45

OPINIONS ANNOUNCED MAY 18, 1992

EXHIBIT 1
DATE 1-27-93
SB HB 255

The Supreme Court decided:

did not make sufficiently substantial threshold showing to entitle him to discovery or evidentiary hearing. (*Wade v. U.S.*, No. 91-5771) Page 4389

CIVIL RIGHTS—Immunity

Qualified immunity from suit applicable to government officials is unavailable to private defendants charged with 42 USC 1983 liability for invoking state replevin, garnishment, and attachment statutes later found unconstitutional. (*Wyatt v. Cole*, No. 91-126) Page 4383

Full Text of Opinions

No. 90-5844

TERRY FOUCHA, PETITIONER v. LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF LOUISIANA

Syllabus

No. 90-5844. Argued November 4, 1991—Decided May 18, 1992

Under Louisiana law, a criminal defendant found not guilty by reason of insanity may be committed to a psychiatric hospital. If a hospital review committee thereafter recommends that the acquittee be released, the trial court must hold a hearing to determine whether he is dangerous to himself or others. If he is found to be dangerous, he may be returned to the hospital whether or not he is then mentally ill. Pursuant to this statutory scheme, a state court ordered petitioner Foucha, an insanity acquittee, returned to the mental institution to which he had been committed, ruling that he was dangerous on the basis of, *inter alia*, a doctor's testimony that he had recovered from the drug induced psychosis from which he suffered upon commitment and was "in good shape" mentally; that he has, however, an antisocial personality, a condition that is not a mental disease and is untreatable; that he had been involved in several altercations at the institution; and that, accordingly, the doctor would not "feel comfortable in certifying that he would not be a danger to himself or to other people." The State Court of Appeals refused supervisory writs, and the State Supreme Court affirmed, holding, among other things, that *James v. United States*, 403 U. S. 354, did not require Foucha's release and that the Due Process Clause of the Fourteenth Amendment was not violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Held: The judgment is reversed.

563 So. 2d 1135, reversed.

JUSTICE WHITE delivered the opinion of the Court with respect to Parts I and II, concluding that the Louisiana statute violates the Due Process Clause because it allows an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness. Although *James*, *supra*, acknowledged that an insanity acquittee could be committed, the Court also held, as a matter of due process, that he is entitled to release when he has recovered his sanity or is no longer dangerous, *id.*, at 368, *i. e.*, he may be held as long as he is both mentally ill and dangerous, but no longer. Here, since the State does not contend that Foucha was

CRIMINAL LAW AND PROCEDURE—Insanity

State statute permitting insanity acquittee who no longer suffers from mental disease or illness to be indefinitely committed to mental institution until he is able to demonstrate that he is not dangerous to himself or others violates Fourteenth Amendment's Due Process Clause. (*Foucha v. Louisiana*, No. 90-5844) Page 4359

CRIMINAL LAW AND PROCEDURE—Insanity

Involuntary administration of anti-psychotic medication to defendant during his murder trial, in absence of findings by district court as to need for particular course of treatment and medical appropriateness of drug administered as required by *Washington v. Harper*, 494 U.S. 210, 58 LW 4249 (1990), created unacceptably high risk that defendant's constitutionally protected trial rights were prejudiced and therefore requires reversal of his conviction. (*Riggins v. Nevada*, No. 90-8466) Page 4374

CRIMINAL LAW AND PROCEDURE—Sentencing

Federal sentencing court may review prosecutor's refusal to file government motion required by 18 USC 3553(c) and Section 5K1.1 of federal Sentencing Guidelines to permit court to depart downward below minimum authorized sentence to reflect defendant's "substantial assistance" to authorities, and may grant remedy if refusal was based on unconstitutional motive; defendant who claimed merely that government's failure to make substantial-assistance motion was improper in light of his cooperation

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NOTE: Where it is deemed desirable, a syllabus (headline) will be released *** at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

mentally ill at the time of the trial court's hearing, the basis for holding him in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. There are at least three difficulties with the State's attempt to perpetuate his confinement on the basis of his antisocial personality. First, even if his continued confinement were constitutionally permissible, keeping him against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. *Vitek v. Jones*, 445 U. S. 480, 492. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. See, e. g., *Jones v. United States*, *supra*, at 368. Second, if he can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. *Jackson v. Indiana*, 406 U. S. 715. Third, the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. *Zimmerman v. Burch*, 494 U. S. 113, 125. Although a State may imprison convicted criminals for the purposes of deterrence and retribution, Louisiana has no such interest here, since Foucha was not convicted and may not be punished. *Jones*, 463 U. S., at 369. Moreover, although the State may confine a person if it shows by clear and convincing evidence that he is mentally ill and dangerous, *id.*, at 362, Louisiana has not carried that burden here. Furthermore, *United States v. Salerno*, 481 U. S. 739—which held that in certain narrow circumstances pretrial detainees who pose a danger to others or the community may be subject to limited confinement—does not save the state statute. Unlike the sharply focused statutory scheme at issue in *Salerno*, the Louisiana scheme is not carefully limited.

WHITE, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BLACKMUN, STEVENS, O'CONNOR, and SCOTER, JJ., joined, and an opinion with respect to Part III, in which BLACKMUN, STEVENS, and SCOTER, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

JUSTICE WHITE delivered the opinion of the Court, except as to Part III.

When a defendant in a criminal case pending in Louisiana is found not guilty by reason of insanity, he is committed to a psychiatric hospital unless he proves that he is not dangerous. This is so whether or not he is then insane. After commitment, if the acquittee or the superintendent begins release proceedings, a review panel at the hospital makes a written report on the patient's mental condition and whether he can be released without danger to himself or others. If release is recommended, the court must hold a hearing to determine dangerousness; the acquittee has the burden of proving that he is not dangerous. If found to be dangerous, the acquittee may be returned to the mental institution whether or not he is then mentally ill. Petitioner contends that this scheme denies him due process and equal protection because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.

I

Petitioner Terry Foucha was charged by Louisiana authorities with aggravated burglary and illegal discharge of a firearm. Two medical doctors were appointed to conduct a pretrial examination of Foucha. The doctors initially reported, and the trial court initially found, that Foucha lacked mental capacity to proceed, App. 8-9, but four months later the trial court found Foucha competent to stand trial. *Id.*, at 4-5. The doctors reported that Foucha was unable to distinguish right from wrong and was insane

at the time of the offense.¹ On October 12, 1984, the trial court ruled that Foucha was not guilty by reason of insanity, finding that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the above crimes and that he is presently insane." *Id.*, at 6. He was committed to the East Feliciana Forensic Facility until such time as doctors recommend that he be released, and until further order of the court. In 1988, the superintendent of Feliciana recommended that Foucha be discharged or released. A three-member panel was convened at the institution to determine Foucha's current condition and whether he could be released or placed on probation without being a danger to others or himself. On March 21, 1988, the panel reported that there had been no evidence of mental illness since admission and recommended that Foucha be conditionally discharged.² The trial judge appointed a two-member sanity commission made up of the same two doctors who had conducted the pretrial examination. Their written report stated that Foucha "is presently in remission from mental illness [but] [w]e cannot certify that he would not constitute a menace to himself or others if released." *Id.*, at 12. One of the doctors testified at a hearing that upon commitment Foucha probably suffered from a drug induced psychosis but that he had recovered from that temporary condition; that he evidenced no signs of psychosis or neurosis and was in "good shape" mentally; that he has, however, an antisocial personality, a condition that is not a mental disease and that is untreatable. The doctor also testified that Foucha had been involved in several altercations at Feliciana and that he, the doctor, would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people." *Id.*, at 18.

After it was stipulated that the other doctor, if he were present, would give essentially the same testimony, the court ruled that Foucha was dangerous to himself and others and ordered him returned to the mental institution. The Court of Appeals refused supervisory writs, and the State Supreme Court affirmed, holding that Foucha had not carried the burden placed upon him by statute to prove that he was not dangerous, that our decision in *Jones v. United States*, 463 U. S. 354 (1983), did not require Foucha's release, and that neither the Due Process Clause nor the Equal Protection Clause was violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari. 499 U. S. ____ (1991).

¹ Louisiana law provides: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." La. Rev. Stat. Ann. § 14:14 (West 1986). JUSTICE KENNEDY disregards the fact that the State makes no claim that Foucha was criminally responsible or that it is entitled to punish Foucha as a criminal.

² The panel unanimously recommended that petitioner be conditionally discharged with recommendations that he (1) be placed on probation; (2) remain free from intoxicating and mind-altering substances; (3) attend a Substance Abuse clinic on a regular basis; (4) submit to regular and random urine drug screening; and (5) be actively employed or seeking employment. (App. 10-11)

Although the panel recited that it was charged with determining dangerousness, its report did not expressly make a finding in that regard.

Addington v. Texas, 441 U.S. 418 (1979), held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others. Proof beyond reasonable doubt was not required, but proof by preponderance of the evidence fell short of satisfying due process.³

When a person charged with having committed a crime is found not guilty by reason of insanity, however, a State may commit that person without satisfying the *Addington* burden with respect to mental illness and dangerousness. *Jones v. United States*, *supra*. Such a verdict, we observed in *Jones*, "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness," *id.* at 363, an illness that the defendant adequately proved in this context by a preponderance of the evidence. From these two facts, it could be properly inferred that at the time of the verdict the defendant was still mentally ill and dangerous and hence could be committed.

We held, however, that "the committed acquittee is entitled to release when he has recovered his sanity, or is no

³ JUSTICE THOMAS in dissent complains that Foucha should not be released based on psychiatric opinion that he is not mentally ill because such opinion is not sufficiently precise—because psychiatry is not an exact science and psychiatrists widely disagree on what constitutes a mental illness. That may be true, but such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the committee is no longer mentally ill or dangerous. It is also reliable enough for the State not to punish a person who by a preponderance of the evidence is found to have been insane at the time he committed a criminal act, to say nothing of not trying a person who is at the time found incompetent to understand the proceedings. And more to the point, medical predictions of dangerousness seem to be reliable enough for the dissent to permit the State to continue to hold Foucha in a mental institution, even where the psychiatrist would say no more than that he would hesitate to certify that Foucha would not be dangerous to himself or others.

JUSTICE KENNEDY's assertion that we overrule the holding of *Jones* described in the above paragraph is fanciful at best. As that paragraph plainly shows, we do not question and fully accept that insanity acquittees may be initially held without complying with the procedures applicable to civil commitments. As is evident from the ensuing paragraph of the text, we are also true to the further holding of *Jones* that both JUSTICE THOMAS and JUSTICE KENNEDY reject: that the period of time during which an insanity acquittee may be held in a mental institution is not measured by the length of a sentence that might have been imposed had he been convicted; rather, the acquittee may be held until he is either not mentally ill or not dangerous. Both Justices would permit the indefinite detention of the acquittee, although the State concedes that he is not mentally ill and although the doctors at the mental institution recommend his release, for no reason other than that a psychiatrist hesitates to certify that the acquittee would not be dangerous to himself or others.

JUSTICE KENNEDY asserts that we should not entertain the proposition that a verdict of not guilty by reason of insanity differs from a conviction. *Post*, at 10. *Jones*, however, involved a case where the accused had been "found, beyond a reasonable doubt, to have committed a criminal act," 463 U.S., at 364. We did not find this sufficient to negate any difference between a conviction and an insanity acquittal. Rather, we observed that a person convicted of crime may of course be punished. But "if different considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished." *Id.*, at 369.

JUSTICE KENNEDY observes that proof beyond reasonable doubt of the commission of a criminal act permits a State to incarcerate and hold the offender on any reasonable basis. There is no doubt that the States have wide discretion in determining punishment for convicted offenders, but the Eighth Amendment insures that discretion is not unlimited. The

longer dangerous," *id.*, at 368; *i. e.* the acquittee may be held as long as he is both mentally ill and dangerous, but no longer. We relied on *O'Connor v. Donaldson*, 422 U.S. 563 (1975), which held as a matter of due process that it was unconstitutional for a State to continue to confine a harmless, mentally ill person. Even if the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed." *Id.*, at 575. In the summary of our holdings in our opinion we stated that "the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." *Jones*, 463 U.S., at 368, 370.⁴ The court below was in error in characterizing the above language from *Jones* as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance. In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. *O'Connor*, *supra*, at 574-575.

The State, however, seeks to perpetuate Foucha's confinement at Feliciana on the basis of his antisocial personality which, as evidenced by his conduct at the facility, the court found rendered him a danger to himself or others. There are at least three difficulties with this position. First, even if his continued confinement were constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. In *Vitek v. Jones*, 445 U.S. 480 (1980), we held that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as mentally ill without appropriate procedures to prove that he was mentally ill. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." *Id.* at 492. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. *Jones*, *supra*, at 368; *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Here, according to the testimony given at the hearing in the trial court, Foucha is not suffering from a mental disease or illness. If he is to be held, he should not be held as a mentally ill person. See *Jones*, *supra*, at 368; *Jackson*, *supra*, at 738. Cf. *United States v. Salerno*, 481 U.S. 739, 747-748 (1987); *Schall v. Martin*, 467 U.S. 253, 270 (1984).

Second, if Foucha can no longer be held as an insanity

Justice cites no authority, but surely would have if it existed, for the proposition that a defendant convicted of a crime and sentenced to a term of years, may nevertheless be held indefinitely because of the likelihood that he will commit other crimes.

JUSTICE THOMAS, dissenting, suggests that there was no issue of the standards for release before us in *Jones*. The issue in that case, however, was whether an insanity acquittee "must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted." *Jones*, 463 U.S., at 356; and in the course of deciding that issue in the negative, we said that the detainee could be held until he was no longer mentally ill or no longer dangerous, regardless of how long a prison sentence might have been. We noted in footnote 11 that *Jones* had not sought a release based on nonillness or nondangerousness, but as indicated in the text, we twice announced the outside limits on the detention of insanity acquittees. The Justice would "wish" away this aspect of *Jones*, but that case merely reflected the essence of our prior decisions.

acquitted in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his commitment. *Jackson v. Indiana, supra*, indicates as much. There, a person under criminal charges was found incompetent to stand trial and was committed until he regained his sanity. It was later determined that nothing could be done to cure the detainee, who was a deaf mute. The state courts refused to order his release. We reversed, holding that the State was entitled to hold a person for being incompetent to stand trial only long enough to determine if he could be cured and become competent. If he was to be held longer, the State was required to afford the protections constitutionally required in a civil commitment proceeding. We noted, relying on *Baxstrom v. Herold*, 383 U.S. 107 (1966), that a convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the State committed him in a civil proceeding. "[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Jackson v. Indiana, supra*, at 724, quoting *Baxstrom, supra*, at 111-112.

Third, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zimmerman v. Burch*, 494 U.S. 113, 125 (1990). See also *Salerno, supra*, at 746; *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones, supra*, at 361 (internal quotation marks omitted.) We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. *Salerno, supra*, at 750.

A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Robinson v. California*, 370 U.S. 660 (1962). Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. *Jones, supra*, at 369. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility as La. Rev. Stat. Ann. § 14:14 (West 1986) requires. See n.1, *supra*.

The State may also confine a mentally ill person if it shows "by clear and convincing evidence that the individual is mentally ill and dangerous." *Jones*, 463 U.S., at 362. Here, the State has not carried that burden; indeed, the State does not claim that Foucha is now mentally ill.

We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement and it is on these cases, particularly *United States v. Salerno, supra*, that the State relies in this case.

Salerno, unlike this case, involved pretrial detention. We observed in *Salerno* that the "government's interest in preventing crime by arrestees is both legitimate and compelling," *id.*, at 749, and that the statute involved there was a constitutional implementation of that interest. The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes (crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses, or certain repeat offenders). *id.*, at 747, and was narrowly focused on a particularly acute problem in which the government

interests are overwhelming. *Id.*, at 750. In addition to first demonstrating probable cause, the government was required, in a "full-blown adversary hearing," to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, i.e., that the "arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 751. Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the "stringent time limitations of the Speedy Trial Act." *Id.*, at 747. If the arrestee were convicted, he would be confined as a criminal proved guilty; if he were acquitted, he would go free. Moreover, the Act required that detainees be housed, to the extent practicable, in a facility separate from persons awaiting or serving sentences or awaiting appeal. *Id.*, at 747-748.

Salerno does not save Louisiana's detention of insanity acquittees who are no longer mentally ill. Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous. At the hearing which ended with Foucha's recommitment, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. There was only a description of Foucha's behavior at Feliciana and his antisocial personality, along with a refusal to certify that he would not be dangerous. When directly asked whether Foucha would be dangerous, Dr. Ritter said only "I don't think I would feel comfortable in certifying that he would not be a danger to himself or to other people." App. 18. This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility.

Furthermore, if Foucha committed criminal acts while at Feliciana, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.

It was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration. 481 U.S., at 747; see also *Schall*, 467 U.S., at 269. Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow

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255 exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno, supra*, at 755. The narrowly focused pretrial detention of arrestees permitted by the Bail Reform Act was found to be one of those carefully limited exceptions permitted by the Due Process Clause. We decline to take a similar view of a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others."

III

It should be apparent from what has been said earlier in this opinion that the Louisiana statute also discriminates against Foucha in violation of the Equal Protection Clause of the Fourteenth Amendment. *Jones* established that insanity acquittees may be treated differently in some respects from those persons subject to civil commitment, but Foucha, who is not now thought to be insane, can no

* JUSTICE THOMAS' dissent firmly embraces the view that the State may indefinitely hold an insanity acquittee who is found by a court to have been cured of his mental illness and who is unable to prove that he would not be dangerous. This would be so even though, as in this case, the court's finding of dangerousness is based solely on the detainee's antisocial personality that apparently has caused him to engage in altercations from time to time. The dissent, however, does not challenge the holding of our cases that a convicted criminal may not be held as a mentally ill person without following the requirements for civil commitment, which would not permit further detention based on dangerousness alone. Yet it is surely strange to release sane but very likely dangerous persons who have committed a crime knowing precisely what they were doing but continue to hold indefinitely an insanity detainee who committed a criminal act at a time when, as found by a court, he did not know right from wrong. The dissent's rationale for continuing to hold the insanity acquittee would surely justify treating the convicted felon in the same way, and if put to it, it appears that the dissent would permit it. But as indicated in the text, this is not consistent with our present system of justice.

JUSTICE THOMAS relies heavily on the American Law Institute's (ALI) Model Penal Code and Commentary. However, his reliance on the Model Code is misplaced and his quotation from the Commentary is importantly incomplete. JUSTICE THOMAS argues that the Louisiana statute follows "the current provisions" of the Model Penal Code, but he fails to mention that § 4.08 is "current" only in the sense that the Model Code has not been amended since its approval in 1962, and therefore fails to incorporate or reflect substantial developments in the relevant decisional law during the intervening three decades. Thus, although this is nowhere noted in the dissent, the Explanatory Notes expressly concede that related and similarly "current" provisions of Article 4 are unconstitutional. See, e.g., ALI, Model Penal Code, § 4.06(2) Explanatory Note, (1985) (noting that § 4.06(2), permitting indefinite commitment of a mentally incompetent defendant without the finding required for civil commitment, is unconstitutional in light of *Jackson v. Indiana*, 406 U.S. 715 (1972), and other decisions of this Court). Nor indeed does JUSTICE THOMAS advert to the 1985 Explanatory Note to § 4.08 itself, even though that Note directly questions the constitutionality of the provision that he so heavily relies on; it acknowledges, as JUSTICE THOMAS does not, that "it is now questionable whether a state may use the single criterion of dangerousness to grant discharge if it employs a different standard for release of persons civilly committed." JUSTICE THOMAS also recites from the Commentary regarding § 4.08. However, the introductory passage that JUSTICE THOMAS quotes prefaces a more important passage that he omits. After explaining the rationale for the questionable provision, the Commentary states: "Constitutional doubts . . . exist about the criterion of dangerousness. If a person committed civilly must be released when he is no longer suffering mental illness, it is questionable whether a person acquitted on grounds of mental disease or defect excluding responsibility can be kept in custody solely on the ground that he continues to be dangerous." *Id.*, § 4.08, Comment J, p. 260. Thus, while JUSTICE THOMAS argues that the Louisiana statute is not a relic of a bygone age, his principal support for this assertion is a 30-year-old

longer be so classified. The State nonetheless insists on holding him indefinitely because he at one time committed a criminal act and does not now prove he is not dangerous. Louisiana law, however, does not provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious and large category of such persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release. Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.

Furthermore, in civil commitment proceedings the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence. *Addington*, 441 U.S., at 425-433. Similarly, the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence when the basis for his original confinement no longer exists. See *Jackson*, 406 U.S., at 724; *Baxstrom*, 383 U.S., at 111-112. Cf. *Humphrey v. Cady*, 405 U.S. 504, 510-511 (1972). However, the State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of proving even this ground for confinement by clear and convincing evidence. The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court.

For the foregoing reasons the judgment of the Louisiana Supreme Court is reversed.

So ordered.

provision of the Model Penal Code whose constitutionality has since been openly questioned by the ALI Reporters themselves.

Similarly unpersuasive is JUSTICE THOMAS' claim regarding the number of States that allow confinement based on dangerousness alone. First, this assertion carries with it an obvious but unacknowledged corollary—the vast majority of States do not allow confinement based on dangerousness alone. Second, JUSTICE THOMAS' description of these state statutes also is importantly incomplete. Even as he argues that a scheme of confinement based on dangerousness alone is not a relic of a bygone age, JUSTICE THOMAS neglects to mention that two of the statutes he relies on have been amended, as JUSTICE O'CONNOR notes. Nor does JUSTICE THOMAS acknowledge that at least two of the other statutes he lists as permitting confinement based on dangerousness alone have been given a contrary construction by highest state courts, which have found that the interpretation for which JUSTICE THOMAS cites them would be impermissible. See *State v. Fields*, 77 N.J. 282, 390 A.2d 574 (1978); *In re Lewis*, 403 A.2d 1115, 1121 (Del. 1979), quoting *Mills v. State*, 256 A.2d 752, 757, n.4 (Del. 1969) ("By necessary implication, the danger referred to must be construed to relate to mental illness for the reason that dangerousness without mental illness could not be a valid basis for indeterminate confinement in the State hospital."). See also ALI, Model Penal Code, *supra*, at 260 (although provisions may on their face allow for confinement based on dangerousness alone, in virtually all actual cases the questions of dangerousness and continued mental disease are likely to be closely linked). As the widespread rejection of the standard for confinement that JUSTICE THOMAS and JUSTICE KENNEDY argue for demonstrates, States are able to protect both the safety of the public and the rights of the accused without challenging foundational principles of American criminal justice and constitutional law.

Foucha v. Louisiana: When Must the State Release Insanity Acquittees?

Paul S. Appelbaum, M.D.

Few legal doctrines have been as durably contentious as the defense of "not guilty by reason of insanity." Widely publicized trials of defendants who plead the insanity defense—for example, mass murderer Jeffrey Dahmer and John Hinckley, the would-be assassin of President Reagan—periodically rivet the public's attention on the question of whether mental disorder should excuse offenders from punishment for their crimes. However difficult the solution to this question may be, the issue of avoiding punishment by no means exhausts the moral and legal conundrums associated with the insanity defense.

In its last term, the U.S. Supreme Court addressed one of the less visible, but no less important, questions raised by a finding of not guilty by reason of insanity: when must the state release a person confined to a psychiatric facility after being found not guilty by reason of insanity? Specifically, if a defendant acquitted by reason of insanity is no longer displaying symptoms of mental illness, can the state continue to hold that person indefinitely, on the basis that he or she continues to represent a danger to the public at large?

Dr. Appelbaum is A. F. Zeleznik professor and chairman in the department of psychiatry at the University of Massachusetts Medical School. Address correspondence to him at the Department of Psychiatry, University of Massachusetts Medical Center, 55 Lake Avenue North, Worcester, Massachusetts 01655.

The issue confronting the court involved a Louisiana man, Terry Foucha, who broke into a house looking for valuables (1). Brandishing a revolver, he chased the couple who lived there into the street. When the police arrived, Foucha fired at them before being subdued. Foucha was charged with aggravated burglary and illegal use of a weapon and pled not guilty by reason of insanity. Under Louisiana's M'Naghten-type test, defendants seeking an insanity acquittal must demonstrate by a preponderance of the evidence that they were "incapable of distinguishing between right and wrong with reference to the conduct in question." With the concurrence of the district attorney, the judge found that Foucha met this standard and, without a trial, entered a verdict of not guilty by reason of insanity.

Foucha was committed to the East Feliciana Forensic Facility, where he remained for the next three and a half years. On the request of the superintendent, a panel was convened at the facility to review his status. Finding that he was no longer mentally ill—his original condition was attributed to a drug-induced psychosis that had long since resolved—the panel recommended conditional discharge, with ongoing monitoring of substance use. As required by Louisiana law, the recommendation was forwarded to the judge who entered the original verdict. The judge appointed a second panel, made up of the two doctors who had examined Foucha at the time of his original plea of not guilty by reason of insanity, to conduct an independent examination.

The examining psychiatrists concurred with the judgment of the

facility that Foucha currently did not have symptoms of psychosis and gave Foucha a diagnosis of antisocial personality disorder. They pointed out that Foucha had been involved in a series of physical altercations at the forensic hospital, including a fight less than two months before that resulted in Foucha's transfer to a maximum-security unit. The examining psychiatrists declined to predict that Foucha would not harm other people if released. In the words of one examiner, "[I would not] feel comfortable in certifying that [Foucha] would not be a danger to himself or other people." Under Louisiana law, Foucha had the burden of demonstrating that he was no longer dangerous. The judge concluded that he had failed to meet this burden and ordered Foucha returned to the forensic facility.

In a case before the Louisiana Supreme Court, Foucha challenged the provisions of the law that had resulted in his rehospitalization (2). In the majority of states, a person found not guilty by reason of insanity and subsequently hospitalized is entitled to release from confinement when found either not mentally ill or no longer dangerous. Louisiana is one of a small number of states that allow indefinite confinement until the defendant can prove that release would not endanger other people, regardless of whether he or she remains mentally ill. Foucha argued that this provision, which constituted indefinite preventive detention on the basis of future dangerousness, violated his rights to due process and equal protection under the law. The Louisiana court upheld the statute, setting the stage for Foucha's appeal to the U.S. Supreme Court.

A fragmented group of U.S. Supreme Court justices demonstrated, if further evidence was needed, just how divisive the insanity defense can be. Writing for a four-judge plurality, Justice White struck down the Louisiana law. "Due process," he wrote, referring to the court's landmark decision in *Jackson v. Indiana* (3), "requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." Insanity

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acquittees are hospitalized because they are assumed to be mentally ill and dangerous (4). Their continued confinement is predicated on both criteria being met. As in the case of civil commitment, neither criterion alone—mental illness or dangerousness—suffices without offending insanity acquittees' right to substantive due process. Moreover, because no other category of person who has committed a criminal act is forced to prove that he or she is no longer dangerous to avoid facing indefinite confinement, the Louisiana statute also violated the right to equal protection of acquittees found not guilty by reason of insanity.

Justice O'Connor, the swing vote in this case, wrote a separate concurring opinion to underscore some limitations she would place on the plurality's holdings. Although she agreed that the Louisiana statute was unconstitutional, O'Connor held open the possibility that persons found not guilty by reason of insanity might legitimately be confined after regaining their mental health, "if the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." O'Connor seemed particularly concerned that insanity acquittees in Louisiana could be held indefinitely, even if they had not committed a violent crime, and that they would be confined in psychiatric facilities, although no longer mentally ill. She seemed to suggest that statutes avoiding these pitfalls might garner her support.

Justice O'Connor's willingness to accept some restrictions on the liberty of insanity acquittees whose symptoms have remitted has implications for another aspect of their treatment and supervision. Several states, led by Oregon (5), have adopted systems in which persons found not guilty by reason of insanity are committed for a period of time to an agency that supervises their care. They may be kept in the hospital, released to the community, or moved back and forth as their condition warrants. While in the community, requirements for treatment, living arrangements, and work may be imposed.

These systems of extended parole might have been endangered by a narrow view of the plurality opinion, which could be read to suggest that the state loses all coercive power over an insanity acquittee who is no longer mentally ill. Justice O'Connor's position that a restoration of mental health does not necessarily end the state's interest in protection of the public may well protect these programs from challenge.

Justices Kennedy and Thomas wrote dissenting opinions in which the other members of the conservative wing of the court, Chief Justice Rehnquist and Justice Scalia, joined. They differed sharply with their colleagues in the majority as to the consequences of a finding of not guilty by reason of insanity. Whereas Justice White's plurality opinion said flatly, "As Foucha was not convicted, he may not be punished," the dissenters noted that Foucha had been proven to have committed the criminal acts in question. A finding of not guilty by reason of insanity, in their judgment, is not equivalent to a finding of innocence. Because a criminal act has been proven, the state retains the right to confine the insanity acquittee even beyond the restoration of sanity. They also found it unnecessary to address the issue of indefinite confinement, noting that Foucha could have been sentenced for up to 32 years and that only a small proportion of that span had elapsed. Moreover, the dissenters were unconcerned with the possibility that Foucha would be held in a psychiatric hospital for preventive detention rather than treatment.

Two other issues of interest to mental health professionals were raised in the court's discussion of the case. Although the issue was not before them explicitly, no justice objected to the characterization of a person with an antisocial personality disorder as someone without a mental illness. The status of personality disorders is controversial within psychiatry, but those disorders often serve as a basis for civil commitment, and their treatment is routinely reimbursed by health insurance. In this case, the conclusions of the examining psychiatrists that antisocial per-

sonality disorder is not a "mental illness" were accepted at face value.

Finally, Justice White's plurality opinion noted that the state had another option for holding on to Mr. Foucha. Had criminal charges been filed "against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way." The legitimacy of prosecuting hospitalized patients who deliberately harm others, a subject of considerable dispute (6), appears to have been given an unqualified endorsement by the Court.

On balance, psychiatry's interests were well treated in *Foucha*. The major concern of the American Psychiatric Association, which filed a friend-of-the-court brief (7), was to preclude psychiatric hospitals from being used as repositories for dangerous persons who are not mentally ill. A majority of justices recognized that concern. On the other hand, four of the nine justices were willing to allow persons who were not mentally ill to be confined indefinitely in mental hospitals merely because they were dangerous. The shift of a single vote could alter the outcome in a future case.

References

1. *Foucha v Louisiana*, 60 USLW 4359, May 19, 1992
2. *State v Foucha*, 563 So 2d 1138 (La 1990)
3. *Jackson v Indiana*, 406 US 715 (1972)
4. *Jones v US*, 463 US 354 (1983)
5. Rogers JL: 1981 Oregon legislation relating to the insanity defense and the Psychiatric Security Review Board. *Willamette Law Review* 18:23-48, 1982
6. Appelbaum KL, Appelbaum PS: A model hospital policy on prosecuting patients for presumptively criminal acts. *Hospital and Community Psychiatry* 42:1233-1237, 1991
7. Brief Amicus Curiae of the American Psychiatric Association, *Foucha v Louisiana*, No 90-5844 (US 1990)

EXHIBIT 3DATE 1-27-93SB HB 255

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MONTANA THIRD JUDICIAL DISTRICT COURT, COUNTY OF DEER LODGE

HENDERSON HOUGHTON, RONALD
 WOOSTER, GENE LEISCHNER,
 PAUL WOODS, RUSSELL THOMPSON,
 GARY SKULETICH, TINA PIERCE,
 MATTHEW EDMUNDSON, et. al.,

Plaintiffs

v..

State of Montana, Department
 of Corrections and Human
 Services, Superintendent of
 the Montana State Hospital,

Defendants.

Cause No. DV-93-03

COMPLAINT FOR

DECLARATORY JUDGMENT

1. The plaintiffs in this action are persons who: (1) have been found not guilty by reason of mental disease or defect pursuant to Section 46-14-301, MCA and its predecessors; (2) were committed to the Montana State Hospital, Warm Springs, Montana; (3) are currently patients at the Montana State Hospital; and, (4) have petitioned for release, have had Montana State Hospital staff recommend their release or desire to petition for release from their commitments to the Montana State Hospital.

2. Montana statutes governing the release of plaintiffs (Sections 46-14-302 and 303, MCA) require that the plaintiffs prove that they are neither mentally ill nor dangerous before they may be released from the Montana State Hospital.

3. The Montana statutes for release directly violate the plaintiffs' rights under the United States Constitution as set forth in Foucha v. Louisiana, _____ U.S. _____, 60 U.S.L.W. 4359 (1992). The U.S. Supreme Court held in Foucha that: the state, not the committed person, has the burden of proof in proceedings for release from confinement; and, the state must prove by clear and convincing evidence that the committed person is both mentally ill and dangerous before the state may continue the commitment.

4. The Defendant State of Montana is responsible for the enactment, implementation and enforcement of the Montana statutes at issue. The Defendant Superintendent of the Montana State Hospital, Warm Springs, Montana is responsible under Section 46-14-302, MCA for petitioning committing courts for the release of persons committed to the Montana State Hospital and the custody of the Superintendent pursuant to Section 46-14-301, MCA. The Defendant Department of Corrections and Human Services requires that the Superintendent acquire the Departments' approval prior to petitioning committing courts for release.

5. Plaintiffs are aware that the Department of Corrections and Human Services is prepared to propose legislation to amend Montana's statutes to conform with the holding in Foucha, however, there is no assurance that such legislation will be enacted into law, nor that the legislation enacted would meet the constitutional standards set by Foucha. Further, the effective date for such legislation, if enacted, could be as late as October 1, 1993.

6. Plaintiffs' rights are currently being abridged by having

to proceed with petitions for release under the current unconstitutional statutory scheme. An action for declaratory judgment, pursuant to Section 27-8-201, et. seq., is an appropriate means to address the violation of plaintiffs' rights.

WHEREFORE the plaintiffs request that the Court adjudge and declare:

1. That Section 46-14-302, MCA is unconstitutional as it violates the plaintiffs' rights under the Due Process Clause guaranteed by the fourteenth amendment to the United States Constitution.

2. That the defendants, their agents and employees be enjoined from implementing, following or enforcing the provisions of the current Montana statutes that require committed persons to prove that they are no longer mentally ill or dangerous.

3. That in any proceedings for the release of plaintiffs or others similarly situated, the State of Montana shall have the burden of proving by clear and convincing evidence that such persons are both mentally ill and dangerous and therefore appropriate for continued commitment to the Montana State Hospital.

4. Award the plaintiffs their costs.

5. Award the plaintiffs such other relief as the court deems appropriate and just.

DATED this 7th day of January, 1993.



ALLEN SMITH JR.
Attorney for Plaintiffs

EXHIBIT 4
DATE 1-27-93
255 HB

HB 255

TESTIMONY OF KIMBERLY A. KRADOLFER
ASSISTANT ATTORNEY GENERAL

I am a member of the Montana Mental Health Planning and Advisory Council and appear today on behalf of the Council to support HB 255. I have been an assistant attorney general for the State of Montana for nine and a half years. During my first four or five years in that position, I handled virtually all of the criminal appeals in which challenges were brought to Montana's statutes on the defense of mental disease or defect. The past five years I have defended civil cases against the State of Montana, including the Ihler class action lawsuit against Montana State Hospital at Warm Springs. It was based upon that background that the Department of Corrections and Human Services asked me to serve as the Justice Department member of the Montana Mental Health Planning and Advisory Council. I have served on the Council for the past year and a half.

Several members of the Council worked with other interested parties over the past year and a half to draft changes to the statutes dealing with commitments of persons acquitted based upon the defense of mental disease or defect. HB 255 was triggered by a number of practical problems which arise in trying to apply the current statutes. Some of those concerns were echoed in the United States Supreme Court's decision in Foucha v. Louisiana. That decision was handed down last May.

The intent of this bill is to address the mandates which were set out in the Foucha decision and to then apply those mandates to

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Montana's statutes. The bill accomplishes a number of things. First, it includes one minor "housekeeping" change which adds the seriously developmentally disabled within the scope of these statutes since they had not been included in the statutes previously for evaluating the reason a person was unable to hold a mental state which is a requisite element of an offense. The bill provides for civil commitment under Title 53, chapter 20, MCA, of anyone determined to have been acquitted of an offense based upon his developmental disability.

Second, the bill addresses the mechanics of how a person who has been committed because he was acquitted of a crime due to his mental disease or defect should be reviewed, how often such review should take place, and what standards should be applied in determining what sort of placement that person should remain in or whether the person should be released.

1. Foucha v. Louisiana

The United States Supreme Court decision in Foucha v. Louisiana held that a person who had been found not guilty by reason of insanity (or by reason of mental disease and defect under Montana's statutes) must be handled as a civil commitment of some sort. The opinion recognized that it was appropriate to presuppose that a person who had just been acquitted of a crime based upon an insanity or mental disease and defect was still suffering from

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mental illness and could be automatically committed for an initial period of time. The opinion also suggested that it would be permissible to have different levels of scrutiny that applied to commitments depending upon the nature of the acts underlying the offense that had been charged.

However, the opinion holds that a state has the obligation to treat this as a civil commitment and to apply the same sorts of standards and burdens that it would apply in other civil commitment cases.

The Foucha holding requires that after the initial 180 day commitment: (1) the State of Montana must assume the burden to prove that a person should be recommitted; (2) the State must prove the need for recommitment by clear and convincing evidence; (3) the recommitment must be based upon proof that the person is still a danger to himself or others; and (4) the State must prove that the dangerousness is caused by the person's mental illness.

In other words, if a person was mentally ill at a given point in time, but he has recovered from that mental illness and it is under control and the illness itself no longer renders him dangerous, the person cannot be constitutionally recommitted (even if he is dangerous because of his criminal propensities).

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2. Levels of Scrutiny.

HB 255 amends the statutes by changing the burden of proof and the standard of proof, and by prohibiting recommitment unless a person is a danger because of his mental illness. It also provides two tiers of scrutiny based upon the acts that formed the basis for the original criminal charges.

First, HB 255 provides that where the charged offense involved "a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the court can immediately commit the person to the custody of the director of the Department of Corrections and Human Services to be placed in an appropriate mental health facility for custody, care, and treatment. By contrast, if an offense did not involve "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the person would simply be committed under Montana's regular civil commitment statutes.

3. Jurisdiction.

Another change involves jurisdiction. Under HB 255, the jurisdiction of the commitment will be moved to the location where the person has actually been committed. This mirrors the process that takes place in the regular civil commitment proceedings, where the district judge of the district where the patient is located would have jurisdiction over the proposed recommitment. (While

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that is often at Montana State Hospital at Warm Springs or the Boulder Center for the Developmentally Disabled, it can also be in community placements under certain circumstances.) The judge presiding on the case would be in the position to review information pertaining to the patient's behavior in his or her community and to rule on the appropriateness of continuing such placement.

4. Notice to County Attorney/Original Judge.

The bill also provides that the county attorney who handled the matter originally when the offense was charged and the judge who originally presided over the initial commitments shall be allowed to continue to provide input on appropriate placement for the person. The statutes as amended require notification of the county attorney and the district judge and also allow those individuals to have an opportunity to appear and provide information to the district court which has current jurisdiction over the person. This allows a higher degree of scrutiny than would normally occur in any other civil commitment.

This provision is patterned after Montana's sentence review division statutes (which require that the county attorney and the sentencing judge be notified of hearings before the sentence review division and be given an opportunity to express their viewpoints on any change in sentence of the inmate).

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5. Annual Review/Second Opinion.

The bill also amends the statutes to provide the same annual review which other patients who are civilly committed receive and to allow them to secure a second opinion from a professional person of the committed person's choice. This language is identical to the statutes pertaining to civil commitments. As a practical matter, such evaluations are conducted with regularity and the court regularly appoints one or more professional person at the request of the patient in preparing for the recommitment proceeding. Dan Anderson will address the fiscal note in his testimony. However, there will as a practical matter be no fiscal impact to this bill since in practice the courts have been appointing professional persons of the patients' choice to assist in preparing for recommitment hearings.

6. Conditional releases.

The other portion of the statutes which are changed pertain to conditional release of a person who had been acquitted based upon mental disease or defect. At the present time, a district judge has virtually unlimited jurisdiction over someone who has been acquitted and is originally committed under these statutes. There is a five-year limit on any conditional release during which time a judge may revoke the release and bring the person back to

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the hospital. The problems that have occurred with this are the same sort that are addressed in Foucha v. Louisiana.

In some instances, district courts have used the conditional release provision to revoke a release into the community based upon activity which had nothing to do with the person's mental illness. For example, a former patient who had been released to a community was picked up for violation of drug laws. His mental illness was not a factor in him violating statutes dealing with dangerous drugs. Rather than prosecuting the person for a crime and sending the person to prison, it was easier for the court and the county attorney to revoke the conditional release and to send him back to the Montana State Hospital. Again, that is unconstitutional under the Foucha decision. Such revocation or recommitment is not constitutional unless the person is a danger and that danger is caused by the person's mental illness.

The changes to the statutes in this area will eliminate the possibility of abuse since they will provide that judges cannot repeatedly release someone and leave them out for nearly five years and then simply revoke based upon some conduct which is a violation of the terms of release. If the violation is caused by the person's mental illness and it demonstrates that the person is in fact dangerous, such revocation is appropriate. However, unless dangerousness can be tied directly to the illness, other criminal proceedings would be more appropriate than recommitment.

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Additionally, if someone has been conditionally released, more than five years has passed from his original commitment to the hospital, and most of that time has been spent on community release without incident, it is more appropriate to simply commit him civilly on a new commitment under the regular commitment statutes if the status of his mental illness warrants commitment. To simply hold a prior criminal charge over someone's head for an indeterminate period of time and to use that as a means of maintaining control over the person is not permissible in light of the Foucha v. Louisiana decision.

7. Lawsuit: Houghton v. State of Montana

On January 7, 1993, based upon the holding in Foucha v. Louisiana decision, a lawsuit was filed by eight named patients at Montana State Hospital who have been committed after acquittal based upon mental disease and defect. Those patients filed suit on behalf of themselves and all others similarly situated to request an injunction against enforcement of Montana's current statutes. They request the relief which this bill would afford. I would note that the hospital staff have identified a ninth patient who falls into this category.

It is the position of the Montana Mental Health Planning and Advisory Council that this bill will establish the standards required by Foucha. It will also structure the recommitment

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process to allow a higher degree of scrutiny in more serious cases (where an act involved "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage"). It also provides a means for continued input from the original county attorney and district court judge. This is therefore a more desirable approach than simply imposing an injunction which leaves questions about the procedures which should be followed, who has standing to appear, the standards which apply, and how recommitment review should be triggered.

Conclusion

The Montana Mental Health Planning and Advisory Council has reviewed this area extensively and has sought input from the hospital, local community mental health providers, the Board of Visitors for Mental Disabilities, and from people working in the criminal justice system. I would urge this committee's thoughtful consideration of this bill and that the committee issue a "Do Pass" recommendation. Thank you.

Western Montana regional community
MENTAL HEALTH CENTER

EXHIBIT 5
DATE 1-27-93
255 HB

**HB 255
TESTIMONY OF JOHN LYNN
DIRECTOR, COMMUNITY SUPPORT SERVICES
WESTERN MONTANA COMMUNITY MENTAL HEALTH**

I have worked as a mental health professional in the public sector here in the state of Montana for 12 years. During that time, I have been a member of the Montana State Hospital Admission and Discharge Review Team which is comprised of a group of professionals from the hospital and the mental health centers from around the state. We are charged with the task of reviewing all admissions to the hospital and the subsequent discharges to assure appropriate care. For many years the team has been frustrated by admissions to the hospital of individuals found not guilty by reason of mental disease or defect but for whom active treatment is not indicated. Historically, such individuals remained at the hospital for periods of time often exceeding the sentence which they would have received had they been found guilty of the crime. Based on the United States Supreme Court decision in Foucha v. Louisiana, this practice is now unconstitutional.

HB 255 would reconcile the Montana statute to the Supreme Court decision while allowing for a review process that requires continued hospitalization for those individuals who remain a danger to self or others due to a mental illness, but allows appropriate referral to community agencies for those individuals who are no longer dangerous because of the illness. The bill makes good sense in terms of the utilization of the Montana State Hospital and it makes good sense clinically. I respectfully request this committee recommend passage of this legislation.

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. 7/B 255
DATE Jan 27/1993 SPONSOR (S) Anderson
PLEASE PRINT PLEASE PRINT PLEASE PRINT

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PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN RUSSELL FAGG, on February 2, 1993, at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Randy Vogel, Vice Chairman (R)
Rep. Dave Brown, Vice Chairman (D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Karyl Winslow (R)
Rep. Diana Wyatt (D)

Members Excused: None.

Members Absent: None.

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 323, HB 340
Executive Action: HB 215, HB 81, HB 255, HB 253, HB 257

HEARING ON HB 323

Opening Statement by Sponsor:

REP. BEA MCCARTHY, House District 66, Anaconda, said this bill allows the court, after a second conviction of cruelty to animals, to limit the defendant's custody of animals. She said that she and her constituents have been trying to collect information for the last two and one-half years on what is

the prison population discussed, then this bill will guarantee that it stays where it is.

REP. VOGEL said that all sentencing is vindictive; it's punishment for doing something wrong. What this bill tries to do is to see that the punishment is absolutely carried out.

REP. RICE said this bill ties everyone's hands. It ties the judge's hands and eliminates the possibility of rehabilitation of anyone coming out of prison.

REP. BROOKE echoed REP. RICE's remarks. She believes the system should retain the flexibility.

REP. GRIMES reminded the committee to think of the families and the victims of the crime. He also asked CHAIRMAN FAGG to clarify what a table motion would do. CHAIRMAN FAGG responded that, if a table motion passes, REP. BACHINI could make a motion on the floor to take the bill off the table; this takes a three/fifths vote to do that. If the table motion fails, the committee can reverse that vote to a do pass vote, and it would go to the floor for a normal debate on second reading.

Vote: HB 81 BE TABLED. Motion carried 14-3. Those voting to table HB 81 were CHAIRMAN FAGG, REPS. BROWN, BIRD, BERGMAN, BROOKE, GRIMES, MCCULLOCH, RICE, RUSSELL, SAYLES, SMITH, TASH, TOOLE, WHALEN, and WYATT. Those voting not to table the bill were REPS. CLARK, WINSLOW and VOGEL.

EXECUTIVE ACTION ON HB 255

Motion: REP. BROWN MOVED HB 255 DO PASS.

Discussion:

REP. TOOLE said the language on page 3, line 15 doesn't give the court the opportunity to make the finding that will get a person committed after being found not guilty due to mental disease or defect. It is a chance for the court to make the finding that the person should be committed because of the inability to defend him/herself. That's what the Supreme Court decision is trying to implement. It says, "The court shall evaluate the nature of the offense with which the defendant was charged." The court should have the discretion to say that, considering what the person did, the court finds he/she has a mental disease or defect. REP. TOOLE said he believes that, if it is necessary to implement this decision, then the committee should pass this bill with that approach.

REP. RICE proposed an amendment. He said that at this type of hearing, a court trial has taken place wherein the defendant rose to the defense and said, "I'm not guilty of this murder because I have a mental disease or defect," and he presents substantial

evidence which was agreed to by the jury. When the defendant is declared not guilty, it goes to another hearing. Putting the court through another hearing to establish mental disease or defect at this point, when there's already been a jury trial, can become a very difficult process.

REP. TOOLE closed on his amendment. Mr. MacMaster read REP. TOOLE'S amendment to the committee. On page 3, line 19, after the word damage, insert: "and if there's substantial evidence to show that at the time of evaluation, the existence of a mental disease or defect."

REP. BIRD referred to page 11, lines 6 and 7 which says "the court may retain jurisdiction to revoke a conditional release for no longer than 5 years." Section 5 discusses Revocation of Conditional Release. She asked Mr. MacMaster to explain sentence 6 and 7. Mr. MacMaster said he was not sure what that sentence means other than the fact that five years was the preferred amount of time among the courts to revoke release.

Motion: REP. BIRD moved to strike lines 6 and 7, page 11, from the bill.

Discussion:

REP. BROOKE asked REP. BIRD why she feels it is important to strike that section from the bill. REP. BIRD replied she is not sure a five-year period is sufficient in these circumstances. A person could revert to the same behavior within five years. REP. BROOKE said, in other words, that person would not be released; that this would eliminate revocation. REP. BROOKE said she believes that five years is sufficient time to rehabilitate. CHAIRMAN FAGG, speaking neither as a proponent or an opponent to the amendment, clarified the amendment. He believes that what this section currently does is allow the courts to retain jurisdiction over a person when that person has been conditionally released. What this section currently says is the court retains jurisdiction for five years, i.e., they can say a person is conditionally released, and that condition remains for five years. After five years, a person is no longer conditionally released; they're just released. REP. BIRD'S amendment would say the court can retain jurisdiction for an indefinite amount of time on a conditional release.

REP. WINSLOW believes there is no choice in this matter; that, with all the backup testimony that courts provide, five years is a given time. CHAIRMAN FAGG said that on the bill as a whole, he believes that is correct. REP. WINSLOW said REP. BIRD'S amendment would change the intent of the bill to the point that the legislature would be in compliance with what the court wishes the committee to do. CHAIRMAN FAGG said he did not know the answer to that, although he thought not.

Vote: The question was called on REP. BIRD'S motion to strike

lines 6 and 7 on page 11 from the bill. REP. BIRD requested that action be deferred for 24 hours or until she checks with the Department of Corrections and Human Services for more accurate information concerning her amendment.

EXECUTIVE ACTION ON HB 253

CHAIRMAN FAGG introduced a proposal from REP. BROWN to the committee which was not included in the scheduled hearings.

REP. BROWN said HB 253 was not meant to be introduced; however, he did feel it was important to discuss the contents of the bill. HB 253 lowers the DUI drivers license reinstatement fee for DUIs from \$100 down to \$50. He put it in as a pressure point in his discussions with the Attorney General Mazurek and the DUI Task Forces so that they could work out various funding matters between the DUI Task Force and the alcohol and drug abuse activities in the local communities, buying new sheriff's equipment, etc. A hearing was not scheduled.

Motion/Vote: REP. BROWN MOVED TO TABLE HB 253. Motion carried 17-1 with REP. VOGEL voting no.

EXECUTIVE ACTION ON HB 257

Motion: REP. TOOLE MOVED HB 257 DO PASS. EXHIBIT 4

Discussion:

REP. TOOLE discussed an emergency response agreement. He said a number of Montana communities have reached an agreement, but they do not effectively provide for the quickest emergency response. Instead they establish protocol for going to the scene, and in some circumstances they depend on one another for assistance.

Motion: REP. TOOLE moved the amendment of an effective date two years from passage and approval, assuming passage and approval would occur during this legislative session. Approval date would be the date the Governor signs the bill.

REP. BROWN said he believed the bill should be tabled.

REP. VOGEL stated he was absent during this hearing; however, while perusing the testimony, he developed a lot of scenarios where this bill could be very detrimental to local governments. He echoed REP. BROWN'S motion to table the bill.

REP. SAYLES said the only reason proponents had signed onto an automatic aid agreement with the Missoula Fire District was because REP. TOOLE'S proposed bill was a threat. This state deserves to have quick medical response whether a person lives in Billings, Missoula, or Helena. He believes if emergency response

HOUSE OF REPRESENTATIVES

Judiciary

COMMITTEE

ROLL CALL

DATE

2-2-93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow	✓		
Rep. Diana Wyatt	✓		

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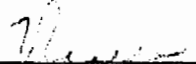
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HOUSE STANDING COMMITTEE REPORT

February 5, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that House Bill 255 (first reading copy -- white) do pass as amended .

Signed: 
Russ Fagg, Chair

And, that such amendments read:

1. Page 4, line 21.

Following: "~~judicial~~"

Insert: "court that ordered the commitment unless that court
transfers jurisdiction to the"

-END-

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN RUSSELL FAGG, on February 4, 1993, at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Randy Vogel, Vice Chairman (R)
Rep. Dave Brown, Vice Chairman (D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Karyl Winslow (R)

Members Excused: Rep. Karyl Winslow

Members Absent: None.

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB 78, SB 129, SB 146, HB 396
Executive Action: SB 129, SB 146, HB 340, HB 255, HB 396

said to the city or county court where the fine is being charged.

Vote: HB 340 DO PASS. Motion carried 16-2 with CHAIRMAN FAGG and REP. RUSSELL voting no.

EXECUTIVE ACTION ON HB 255

Motion: REP. BROWN MOVED HB 255 DO PASS.

Motion: REP. SMITH moved to adopt a concept amendment and asked Dan Anderson, Administrator, Department of Corrections and Human Services, Mental Health Division, for his assistance and opinion.

Mr. Anderson said he has no objection to amending the bill back to its original language, wherein the original court had changed its extension.

REP. RICE asked Mr. Anderson what the official procedure is. Mr. Anderson responded that, following the initial hearing, the same judges make a determination of jurisdiction, where a patient should be. That means the Department of Corrections would transport that person back to his own district court.

CHAIRMAN FAGG asked Mr. Anderson if the Department of Corrections would have to transport patients once a year after this law. Mr. Anderson said that current law allows for an optional annual review. CHAIRMAN FAGG thought that is what this law is changing. He thought, currently, it was an optional review once a year, and this law was requiring that review under a Supreme Court decision. Mr. Anderson said the bill requires an annual clinical review of the patient's status and a report of clinical status to the director. The Department of Corrections has the option, using clinical information, to determine whether the patient is discharged or not. The patient, himself, also has an option to be reviewed each year.

Vote: The question was called on the concept amendment of REP. SMITH. Motion carried unanimously 18-0.

Motion/Vote: REP. BROWN MOVED HB 255 DO PASS AS AMENDED. Motion carried unanimously 18-0.

EXECUTIVE ACTION ON HB 396

Motion: REP. WHALEN MOVED HB 396 DO PASS.

Discussion:

REP. BROWN asked Ron Ashabraner, State Farm Insurance, whether

HOUSE OF REPRESENTATIVES

Judiciary

COMMITTEE

ROLL CALL

DATE

February 4, 1993

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow			✓
Rep. Diana Wyatt	✓		

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HOUSE OF REPRESENTATIVES

Judiciary

COMMITTEE

ROLL CALL VOTE

DATE 2-4-93 BILL NO. HB 255 NUMBER 18

MOTION: Motion to pass carried 18-0 unanimously

NAME	AYE	NO
Rep. Russ Fagg, Chairman	✓	
Rep. Randy Vogel, Vice-Chair	✓	
Rep. Dave Brown, Vice-Chair	✓	
Rep. Jodi Bird	✓	
Rep. Ellen Bergman	✓	
Rep. Vivian Brooke	✓	
Rep. Bob Clark	✓	
Rep. Duane Grimes	✓	
Rep. Scott McCulloch	✓	
Rep. Jim Rice	✓	
Rep. Angela Russell	✓	
Rep. Tim Sayles	✓	
Rep. Liz Smith	✓	
Rep. Bill Tash	✓	
Rep. Howard Toole	✓	
Rep. Tim Whalen	✓	
Rep. Karyl Winslow	✓	
Rep. Diana Wyatt	✓	

HOUSE STANDING COMMITTEE REPORT

February 5, 1993

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that House Bill 255 (first reading copy -- white) do pass as amended .

Signed: Russ Fagg
Russ Fagg, Chair

And, that such amendments read:

1. Page 4, line 21.

Following: "~~judicial~~"

Insert: "court that ordered the commitment unless that court transfers jurisdiction to the"

-END-

JS
26-976
11/2

COMMITTEE--SENATE JUDICIARY

Page 3

- BILL NO - REFERRED - HEARING - OTHER CONSIDERATION DATES - EXECUTIVE ACTION/DATE/VOTE ----- REREFERRED ---- DATE READ

HB0245	KADAS, MIKE	2/23	3/19	ESTABLISH GROUNDS FOR TERMINATION OF MOBILE HOME TENANCY	CONCUR AS AMENDED 3-26	3/27
HB0255	ANDERSON, SHIELL	2/16	3/04	REVISE RELEASE OR DISCHARGE OF DEFENDANT WHO PLED MENTAL DISEASE OR DEFECT	CONCUR AS AMENDED 3-8	3/08
HB0258	TOOLE, HOWARD	2/12	3/15	DEDUCTION FROM INTERIM EARNINGS DEDUCTION FROM WRONGFUL DISCHARGE AWARD	CONCUR AS AMENDED 3-17	3/18
HB0272	RICE, JIM	2/12	3/17	DEPT. BILL WITH TECHNICAL GAMBLING LAW CHANGES	CONCUR AS AMENDED 3-17	3/18
HB0278	BARDANOUVE, FRANCIS	3/10	3/22	REVISE DISTRICT COURT CRIMINAL EXPENSE REIMBURSEMENT	CONCUR 3-26	3/27
HB0307	DEBRUYCKER, ROGER	2/12	3/17	ALLOW DEPT. JUSTICE TO ADOPT NEW AMUSEMENT GAMES BY RULE	CONCUR AS AMENDED 3-17	3/18
HB0323	MCCARTHY, BEA	2/12	3/05	INJUNCTION AGAINST ONE CONVICTED OF CRUELTY TO ANIMALS	CONCUR AS AMENDED 4-13	4/13
HB0335	TOOLE, HOWARD	3/01	3/18	GENERALLY REVISE CHILD SUPPORT ENFORCEMENT LAWS	TABLED ON 03/29	
HB0340	BROWN, DAVE	2/16	3/03	INCLUDE PURCHASE OR ATTEMPT TO PURCHASE ALCOHOL UNDER POSSESSION STATUTE	CONCUR 3-3	3/04
HB0346	BENEDICT, STEVE	3/01	3/24	MEDICAL MALPRACTICE TORT REFORM	CONCUR AS AMENDED 3-26	3/30
HB0357	FAGG, RUSSELL	2/20	3/23	EXPAND CATEGORY OF PERSONS PROTECTED BY AIRCRAFT LIEN	CONCUR 3-23	3/27
HB0396	WHALEN, TIM	2/20	3/19	REFUSAL OF DRIVER TO TAKE ALCOHOL TEST CAN'T AFFECT INSURANCE	TABLED ON 03/26	

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HOUSE BILL NO. 255

INTRODUCED BY ANDERSON

BY REQUEST OF THE DEPARTMENT OF CORRECTIONS
AND HUMAN SERVICES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE CRITERIA
APPLICABLE TO THE CONDITIONAL RELEASE OR DISCHARGE OF A
PERSON WHO HAS RELIED UPON THE DEFENSE OF MENTAL DISEASE OR
DEFECT; PROVIDING FOR A DIAGNOSIS OF SERIOUSLY
DEVELOPMENTALLY DISABLED IN EXAMINATION REPORTS; REVISING
THE HEARING PROCEDURE; AMENDING SECTIONS 46-14-206,
46-14-301, 46-14-302, 46-14-303, 46-14-304, AND 46-14-312,
MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 46-14-206, MCA, is amended to read:

"46-14-206. Report of examination. (1) A report of the
examination may must include the following:

(a) a description of the nature of the examination;

(b) a diagnosis of the mental condition of the
defendant, including an opinion as to whether the defendant
is seriously mentally ill, as defined in 53-21-102, or is
seriously developmentally disabled, as defined in 53-20-102;

(c) if the defendant suffers from a mental disease or
defect, an opinion as to the defendant's capacity to

understand the proceedings against the defendant and to
assist in the defendant's own defense;

(d) when directed by the court, an opinion as to the
capacity of the defendant to have a particular state of mind
that is an element of the offense charged; and

(e) when directed by the court, an opinion as to the
capacity of the defendant, because of a mental disease or
defect, to appreciate the criminality of the defendant's
behavior or to conform the defendant's behavior to the
requirement of the law.

(2) If the examination cannot be conducted by reason of
the unwillingness of the defendant to participate in the
examination, the report must state that fact and must
include, if possible, an opinion as to whether the
unwillingness of the defendant was the result of mental
disease or defect."

Section 2. Section 46-14-301, MCA, is amended to read:

"46-14-301. ~~Commitment~~ upon finding of not guilty by
reason of lack of mental state -- hearing to determine
release or discharge. (1) When a defendant is found not
guilty for the reason that due to a mental disease or defect
the defendant could not have a particular state of mind that
is an essential element of the offense charged, the court
shall order a predisposition investigation in accordance
with 46-18-112 and 46-18-113, which must include an

1 investigation of the present mental condition of the
 2 defendant. If the trial was by jury, the court shall hold a
 3 hearing to determine the appropriate disposition of the
 4 defendant. If the trial was by the court, the court may hold
 5 a hearing to obtain any additional testimony it considers
 6 necessary to determine the appropriate disposition of the
 7 defendant. In either case, the testimony and evidence
 8 presented at the trial must be considered by the court in
 9 making its determination.

10 ~~(2) The court, upon finding that the defendant may not~~
 11 ~~be discharged or released without danger to others, shall~~
 12 ~~order the defendant committed to the custody of the~~
 13 ~~superintendent of the Montana state hospital to be placed in~~
 14 ~~an appropriate institution for custody, care, and treatment.~~

15 (2) The court shall evaluate the nature of the offense
 16 with which the defendant was charged. If the offense:

17 (a) involved a substantial risk of serious bodily
 18 injury or death, actual bodily injury, or substantial
 19 property damage, the court may find that the defendant
 20 suffers from a mental disease or defect that renders the
 21 defendant a danger to the defendant or others. If the court
 22 finds that the defendant presents a danger to the defendant
 23 or others, the defendant may be committed to the custody of
 24 the director of the department of corrections and human
 25 services to be placed in an appropriate mental health

1 facility for custody, care, and treatment. However, if the
 2 court finds that the defendant is seriously developmentally
 3 disabled, as defined in 53-20-102, the prosecutor shall
 4 petition the court in the manner provided in Title 53,
 5 chapter 20.

6 (b) charged did not involve a substantial risk of
 7 serious bodily injury or death, actual bodily injury, or
 8 substantial property damage, the court shall release the
 9 defendant. The prosecutor may petition the court in the
 10 manner provided in Title 53, chapter 20 or 21.

11 (3) A person committed to the custody of the
 12 superintendent director of the department of corrections and
 13 human services shall must have a hearing within 180 days of
 14 confinement to determine the person's present mental
 15 condition and whether the person may must be discharged or
 16 released without danger to others or whether the commitment
 17 may be extended because the person continues to suffer from
 18 a mental disease or defect that renders the person a danger
 19 to the person or others. The hearing must be conducted by
 20 the court--that--ordered--the--commitment--unless--that--court
 21 transfers jurisdiction to--the--third--judicial COURT THAT
 22 ORDERED THE COMMITMENT UNLESS THAT COURT TRANSFERS
 23 JURISDICTION TO THE district court in the district in which
 24 the person has been placed. The court shall cause notice of
 25 the hearing to be served upon the person, the person's

counsel, and the prosecutor, and the court that originally ordered the commitment. The hearing is a civil proceeding, and the burden is upon the defendant department of corrections and human services to prove by a--preponderance of--the clear and convincing evidence that the defendant person may not be safely released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage.

(4) According to the determination of the court upon the hearing, the defendant person must be discharged or released on conditions the court determines to be necessary or must be committed to the custody of the superintendent-of the--Montana--state--hospital director of the department of corrections and human services to be placed in an appropriate institution mental health facility for custody, care, and treatment.

(5) A professional person shall review the status of the person each year. At the time of the annual review, the director of the department of corrections and human services or the person or the representative of the person may petition for discharge or release of the person. Upon request for a hearing, a hearing must be held pursuant to

the provisions of subsection (3)."

Section 3. Section 46-14-302, MCA, is amended to read:

"46-14-302. Discharge or release upon motion of superintendent director. (1) If the superintendent--of--the Montana---state---hospital director of the department of corrections and human services believes that a person committed to the superintendent's director's custody under 46-14-301 may be discharged or released on condition without danger to the person or others because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage, the superintendent director shall make application for the discharge or release of the person in a report to the district court by which the person was committed in the district in which the person has been placed and shall send a copy of the application and report to the prosecutor of the county from which the defendant person was committed and to the court that originally committed the person.

(2) The county attorney and the judge who originally committed the person may transmit to the court statements of their reasons for requesting or granting the original commitment and shall transmit the statements within 7 days

1 if requested to do so by the presiding court. The county
 2 attorney and the judge who originally committed the person
 3 must be given the opportunity to request a hearing on the
 4 requested release of the person and to appear at the
 5 hearing.

6 (3) Either the director of the department of
 7 corrections and human services or the person may also make
 8 application to the court for discharge or release as part of
 9 the person's annual treatment review.

10 {2}(4) The court shall then appoint at least two
 11 persons one person who are is either a qualified
 12 psychiatrists psychiatrist or licensed clinical
 13 psychologists psychologist to examine the person and to
 14 report their--opinion as to the person's mental condition
 15 within 60 days or a longer period that the court determines
 16 to be necessary for the purpose. To facilitate the
 17 examinations and the proceedings on the examinations, the
 18 court may have the person confined in any institution mental
 19 health facility located near the place where the court sits
 20 that may be designated by the superintendent-of-the--Montana
 21 state-hospital director of the department of corrections and
 22 human services as suitable for the temporary detention of
 23 irresponsible persons suffering from mental disease or
 24 defect.

25 (5) The committed person or the person's attorney may

1 secure a professional person of the committed person's
 2 choice to examine the committed person and to testify at the
 3 hearing. If the person wishing to secure the testimony of a
 4 professional person is unable to do so because of financial
 5 reasons, the court shall appoint an additional professional
 6 person to perform the examination. Whenever possible, the
 7 court shall allow the committed person or the person's
 8 attorney a reasonable choice of an available professional
 9 person qualified to perform the requested examination. The
 10 professional person must be compensated by the department of
 11 corrections and human services.

12 {3}(6) If the court is satisfied by the report filed
 13 under subsection (1) and the testimony of the reporting
 14 psychiatrist or licensed clinical psychologist that the
 15 committed person may be discharged or released on condition
 16 without-danger-to-the-person-or-others because the person no
 17 longer suffers from a mental disease or defect that causes
 18 the person to present a substantial risk of serious bodily
 19 injury or death to the person or others, of an imminent
 20 threat of physical injury to the person or others, or of
 21 substantial property damage, the court shall order the
 22 person's discharge or release on conditions that the court
 23 determines to be necessary.

24 {4}(7) If the court is not satisfied, it shall promptly
 25 order a hearing to determine whether the person may safely

be discharged or released on the grounds that the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage. A hearing is considered a civil proceeding, and the burden is upon the committed-person state to prove by a--preponderance--of--the clear and convincing evidence that the person may not be safely be discharged or released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, of an imminent threat of physical injury to the person or others, or of substantial property damage. According to the determination of the court upon the hearing, the committed person must then be discharged or released on conditions that the court determines to be necessary or must be recommitted to the custody of the superintendent-of-the-Montana-state-hospital director of the department of corrections and human services, subject to discharge or release only in accordance with the procedures provided in this section and 46-14-303."

Section 4. Section 46-14-303, MCA, is amended to read:

"46-14-303. Application for discharge or release by committed person. A committed person may make application

for discharge or release to in the district court by which the-person-was-committed, in the district in which the person has been placed, and the procedure to be followed upon the application is the same as that prescribed in 46-14-302 in the case of an application by the superintendent-of-the-Montana-state-hospital director of the department of corrections and human services. However, an application by a committed person need not be considered until the person has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for the person's release or discharge."

Section 5. Section 46-14-304, MCA, is amended to read:

"46-14-304. Recombitment-----after Revocation of conditional release. (1) If--within--5--years--after--the conditional-release-of-a--committed--person The court may order revocation of a person's conditional release if the court determines after hearing evidence that:

(a) the conditions of release have not been fulfilled;

and

(b) that-for-the-safety-of-the-person-or-for-the-safety of---others---the---person's---conditional---release---should---be

1 revoked; based on the violations of the conditions and the
 2 person's past mental health history, there is a substantial
 3 likelihood that the person continues to suffer from a mental
 4 disease or defect that causes the person to present a
 5 substantial risk of serious bodily injury or death to the
 6 person or others, of an imminent threat of physical injury
 7 to the person or others, or of substantial property damage.

8 (2) The court may retain jurisdiction to revoke a
 9 conditional release for no longer than 5 years.

10 (3) If the court finds that the conditional release
 11 should be revoked, the court shall immediately order the
 12 person to be recommitted to the custody of the
 13 superintendent-of-the-Montana-state-hospital; director of the
 14 department of corrections and human services, subject to
 15 discharge or release only in accordance with the procedures
 16 provided in 46-14-302 and 46-14-303."

17 **Section 6.** Section 46-14-312, MCA, is amended to read:

18 "46-14-312. Sentence to be imposed. (1) If the court
 19 finds that the defendant at the time of the commission of
 20 the offense of which the defendant was convicted did not
 21 suffer from a mental disease or defect as described in
 22 46-14-311, the court shall sentence the defendant as
 23 provided in Title 46, chapter 18.

24 (2) If the court finds that the defendant at the time
 25 of the commission of the offense suffered from a mental

1 disease or defect as described in 46-14-311, any mandatory
 2 minimum sentence prescribed by law for the offense need not
 3 apply and the court shall sentence the defendant to be
 4 committed to the custody of the director of the department
 5 of corrections and human services to be placed in an
 6 appropriate institution for custody, care, and treatment for
 7 a definite period of time not to exceed the maximum term of
 8 imprisonment that could be imposed under subsection (1). The
 9 authority of the court with regard to sentencing is the same
 10 as authorized in Title 46, chapter 18, if the treatment of
 11 the individual and the protection of the public are provided
 12 for.

13 (3) Either the director or a defendant whose sentence
 14 has been imposed under subsection (2) may petition the
 15 sentencing court for review of the sentence if the
 16 professional person certifies that:

17 (a) the defendant no longer suffers from a mental
 18 disease or defect;

19 (b) the defendant's mental disease or defect no longer
 20 renders him the defendant unable to appreciate the
 21 criminality of his the defendant's conduct or to conform his
 22 the defendant's conduct to the requirements of law; or

23 (c) the defendant suffers from a mental disease or
 24 defect but is not a danger to the defendant or others; or

25 (d) the defendant suffers from a mental disease or

1 defect that makes him the defendant a danger to himself the
2 defendant or others, but either:

3 (i) there is no treatment available for his the mental
4 disease or defect;

5 (ii) or--he the defendant refuses to cooperate with
6 treatment; or

7 (iii) the defendant will no longer benefit from active
8 inpatient treatment for the mental disease or defect.

9 (4) The sentencing court may make any order not
10 inconsistent with its original sentencing authority except
11 that the length of confinement or supervision must be equal
12 to that of the original sentence. The professional person
13 shall review the defendant's status each year."

14 NEW SECTION. Section 7. Effective date. [This act] is
15 effective on passage and approval.

-End-

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on March 4, 1993, at 10:02 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 68
HB 134
HB 151
HB 255
Executive Action: HB 68
HB 151
HB 66
HB 67

HEARING ON HB 68

Opening Statement by Sponsor:

Representative Fagg, District 89, told the Committee that HB 68 was brought by the County Attorneys Association. Currently the statute says "within 10 days after an omnibus hearing in District

Hood said that it would not be a burden.

Senator Towe asked Ms. Hood about witnesses that were not listed by the defense. Ms. Hood said on page 2, where the time line change is made it says "or a later date as the court may, for a good cause permit." Ms. Hood said that would allow a prosecution to deal with witnesses that were later discovered.

Closing by Sponsor:

Rep. Fagg said he would appreciate support for HB 68.

EXECUTIVE ACTION ON HB 68

Motion/Vote:

Senator Blaylock moved HB 68 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

HEARING ON HB 255

Opening Statement by Sponsor:

Rep. Anderson, District 81, said HB 255 was introduced as a result of a Supreme Court case, Foucha vs. Louisiana. The case stated that the way we presently keep mentally incompetent people is unconstitutional. Currently, it is required that a person has to prove, by a preponderance of evidence, that they are no longer mentally incompetent in order to be released. The Foucha case replaces the burden on the person, and places the burden on the state to show clear and convincing evidence that the person is still mentally insane in order to be kept in a mental institution. Rep. Anderson said there are eight cases that are being brought against the State of Montana challenging the state that they are being unconstitutionally held in light of the Foucha case. Rep. Anderson said if HB 255 is passed it would make those cases mute. Rep. Anderson submitted and explained amendments. (Exhibit #1)

Proponents' Testimony:

Kimberly Kradolfer, Assistant Attorney General, read from prepared testimony. (Exhibit #2)

Dan Anderson, Department of Corrections & Human Services read from prepared testimony. (Exhibit #3)

Kelly Morrison, Executive Director of the Mental Disabilities Board of Visitors, said they support HB 255 with amendments. Ms. Morrison had some suggested revisions for HB 255. Ms. Morrison said that on page 5, line 2, reference is made to the burden being placed on the Department of Corrections and Human Services. Ms. Morrison suggested that the current wording be changed and that the burden be placed upon the state. Ms. Morrison said that

if a person is no longer mentally ill or dangerous there would be no basis to restrict liberties. Therefore the Board suggests that on page 8, line 22, the sentence end with the word "discharged," then delete the remainder of the sentence. Ms. Morrison supports HB 255 with the revisions and the amendments proposed by the Department of Corrections & Human Services.

Opponents' Testimony:

NONE

Questions From Committee Members and Responses:

Senator Blaylock asked Ms. Kradolfer if she objected to the revisions suggested by Ms. Morrison. Ms. Kradolfer said no.

Senator Towe asked Ms. Kradolfer about the people who this law would affect. Ms. Kradolfer said there are nine people who have currently been acquitted. Under the statute on mental diseases and defect, as a defense, those people have been found not guilty by reason of mental disease or defect. Ms. Kradolfer said those people are currently placed at the hospital and a few of them have been there for 12 years. Unless they can prove themselves no longer a danger, then they are placed at the hospital forever.

Senator Towe asked Ms. Kradolfer if the defense of mental disease and defect was abolished. Ms. Kradolfer said yes, in 1979. However, it is still a defense, but is restructured. Ms. Kradolfer said that the state does not have an insanity defense, but if a person can show at the time of the defense they could not have a requisite mental state, then an insanity plea would apply.

Senator Towe asked Ms. Kradolfer if the change of the burden of proof was from the Foucha case. Ms. Kradolfer said yes. Ms. Kradolfer said Foucha changed the burden to the state and it changed it to clear up "clear and convincing" evidence. Foucha also requires that any continuing commitment be based upon a persons continued dangerousness because of mental disease or defect.

Senator Towe asked Ms. Kradolfer if the conditional release provision was taken from the Foucha case. Ms. Kradolfer said yes. Currently, if a person is caught doing something wrong that is not at all related to mental disease or defect, they would get pulled back into the state hospital. Ms. Kradolfer said that if a person has not been convicted of an offense they should be entitled to the same civil liberties as everyone else, unless they have mental illness that justifies commitment and treatment.

Senator Towe asked Ms. Kradolfer about the burden of proof. Ms. Kradolfer said the burden would always be on the state to continue the commitment and to justify continued commitment.

Senator Towe asked Ms. Kradolfer about substantial property damage. Ms. Kradolfer said substantial property damage would not be in and of itself a basis for commitment. The person would have to be suffering from mental disease and defect which caused that person to engage in conduct that resulted in substantial risk of serious bodily injury, death, an imminent threat of injury, or substantial property damage.

Senator Towe asked Ms. Kradolfer if the threat or risk of property damage is a basis for commitment under HB 255. Ms. Kradolfer said it is not the intent of HB 255 that substantial property damage must have actually occurred. Ms. Kradolfer said that may indicate that a person is a greater risk to themselves or others, rather than someone who had not engaged in that type of conduct.

Senator Towe asked Ms. Kradolfer about the circumstances on which a person would not be released from a hospital. Ms. Kradolfer said the person would have to either caused a substantial risk of serious bodily injury, an imminent threat of injury to a person, or caused substantial property damage.

Senator Towe asked Ms. Kradolfer about the commitment provision. Ms. Kradolfer said under the current Criminal Commitment Statute, if a person is acquitted and commits any kind of offense, that person could be put in a hospital. Ms. Kradolfer said the reason substantial property damage is in the provision is to have a cut off so the court cannot use any kind of criminal act to trigger a higher level of scrutiny. If an offense was serious, the court would be allowed to keep close tabs on a person; however, if the offense was for a minor property crime the court would not be able to keep track of a person.

Closing by Sponsor:

Representative Anderson closed.

HEARING ON HB 134

Opening Statement by Sponsor:

Representative Peterson, District 1, said HB 134 sets up a plan to suspend or revoke certification. Rep. Peterson said there were two main parts to HB 134. Rep. Peterson said the first change is on page 2, line 6, regarding misdemeanor fines punishable by \$25. Rep. Peterson said the meat of HB 134 is on page 7, subsection b, regarding the revocation or suspension of certification of police officers.

Proponents' Testimony:

Gene Kiser, Montana Board of Crime Control, said HB 134 would develop procedures for revoking or suspending the certification

ROLL CALL

SENATE COMMITTEE

Judiciary

DATE

3-4-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye	X		

FC8

Attach to each day's minutes

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Amendments to House Bill No. 255
Third Reading Copy (blue)

Suggested by Dan Anderson of the Department of Corrections

For the Committee on Judiciary

Prepared by Valencia Lane
March 1, 1993

SENATE JUDICIARY

EXHIBIT NO. 1

DATE 3-4-93

BILL NO. HB255

1. Page 6, line 17.

Following: "~~committed~~"

Insert: "by which the person was committed unless that court
transfers jurisdiction to the court"

2. Page 6, lines 20 and 21.

Following: "committed" on line 20

Strike: remainder of line 20 through "person" on line 21

3. Page 6, line 22 through page 7, line 5.

Strike: subsection (2) in its entirety

Renumber: subsequent subsections

4. Page 10, line 1.

Following: "~~te~~"

Strike: "in"

Insert: "to"

5. Page 10, line 2.

Following: "~~committed,~~"

Insert: "by which the person was committed unless that court
transfers jurisdiction to the court"

HB 255
Senate Judiciary Committee
March 4, 1993

SENATE JUDICIARY

EXHIBIT NO. 2

DATE 3-4-93

BILL NO. HB255

TESTIMONY OF KIMBERLY A. KRADOLFER
ASSISTANT ATTORNEY GENERAL

I am a member of the Montana Mental Health Planning and Advisory Council and appear today on behalf of the Council to support HB 255. I have been an assistant attorney general for the State of Montana for nine and a half years. During my first four or five years in that position, I handled virtually all of the criminal appeals in which challenges were brought to Montana's statutes on the defense of mental disease or defect. The past five years I have defended civil cases against the State of Montana, including the Ihler class action lawsuit against Montana State Hospital at Warm Springs. It was based upon that background that the Department of Corrections and Human Services asked me to serve as the Justice Department member of the Montana Mental Health Planning and Advisory Council. I have served on the Council for the past year and a half.

Several members of the Council worked with other interested parties over the past year and a half to draft changes to the statutes dealing with commitments of persons acquitted based upon the defense of mental disease or defect. HB 255 was triggered by a number of practical problems which arise in trying to apply the current statutes. Some of those concerns were echoed in the United States Supreme Court's decision in Foucha v. Louisiana. That decision was handed down last May.

March 4, 1993

The intent of this bill is to address the mandates which were set out in the Foucha decision and to then apply those mandates to Montana's statutes. The bill accomplishes a number of things. First, it includes one minor "housekeeping" change which adds the seriously developmentally disabled within the scope of these statutes since they had not been included in the statutes previously for evaluating the reason a person was unable to hold a mental state which is a requisite element of an offense. The bill provides for civil commitment under Title 53, chapter 20, MCA, of anyone determined to have been acquitted of an offense based upon his developmental disability.

Second, the bill addresses the mechanics of how a person who has been committed because he was acquitted of a crime due to his mental disease or defect should be reviewed, how often such review should take place, and what standards should be applied in determining what sort of placement that person should remain in or whether the person should be released.

1. Foucha v. Louisiana

The United States Supreme Court decision in Foucha v. Louisiana held that a person who had been found not guilty by reason of insanity (or by reason of mental disease and defect under Montana's statutes) must be handled as a civil commitment of some sort. The opinion recognized that it was appropriate to presuppose that a person who had just been acquitted of a crime based upon an

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insanity or mental disease and defect was still suffering from mental illness and could be automatically committed for an initial period of time. The opinion also suggested that it would be permissible to have different levels of scrutiny that applied to commitments depending upon the nature of the acts underlying the offense that had been charged.

However, the opinion holds that a state has the obligation to treat this as a civil commitment and to apply the same sorts of standards and burdens that it would apply in other civil commitment cases.

The Foucha holding requires that after the initial 180 day commitment: (1) the State of Montana must assume the burden to prove that a person should be recommitted; (2) the State must prove the need for recommitment by clear and convincing evidence; (3) the recommitment must be based upon proof that the person is still a danger to himself or others; and (4) the State must prove that the dangerousness is caused by the person's mental illness.

In other words, if a person was mentally ill at a given point in time, but he has recovered from that mental illness and it is under control and the illness itself no longer renders him dangerous, the person cannot be constitutionally recommitted (even if he is dangerous because of his criminal propensities).

EXHIBIT 2
DATE 3-4-93
HB 255

2. Levels of Scrutiny.

HB 255 amends the statutes by changing the burden of proof and the standard of proof, and by prohibiting recommitment unless a person is a danger because of his mental illness. It also provides two tiers of scrutiny based upon the acts that formed the basis for the original criminal charges.

First, HB 255 provides that where the charged offense involved "a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the court can immediately commit the person to the custody of the director of the Department of Corrections and Human Services to be placed in an appropriate mental health facility for custody, care, and treatment. By contrast, if an offense did not involve "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage," the person would simply be committed under Montana's regular civil commitment statutes.

3. Jurisdiction.

The original bill changed jurisdiction of follow-up proceedings to the location where the person was committed. That portion of the bill was amended in the House. There is one portion of the jurisdiction which inadvertently did not get amended back. Dan Anderson of the Mental Health Division has prepared an amendment which he will present to this Committee which will finish

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Testimony of Kimberly A. Kradolfer: HB 255
Page 5
March 4, 1993

making that change back to the way jurisdiction is currently defined.

4. Annual Review/Second Opinion.

The bill also amends the statutes to provide the same annual review -- with a second opinion by a professional person of the committed person's choice -- which other patients who are civilly committed receive. While annual review is currently provided for, there is no provision for a second opinion.

The language in the bill pertaining to the second opinion is identical to the statutes pertaining to civil commitments. As a practical matter, such evaluations are conducted with regularity and the court regularly appoints one or more professional person at the request of the patient in preparing for the recommitment proceeding. Dan Anderson will address the fiscal note in his testimony. I would note, however, there will as a practical matter be no fiscal impact to this bill since in practice the courts have been appointing professional persons of the patients' choice to assist in preparing for recommitment hearings.

5. Conditional releases.

The other portion of the statutes which are changed pertain to conditional release of a person who had been acquitted based upon mental disease or defect. At the present time, a district judge has virtually unlimited jurisdiction over someone who has

Testimony of Kimberly A. Kradolfer: HB 255
Page 6
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been acquitted and is originally committed under these statutes. There is a five-year limit on any conditional release during which time a judge may revoke the release and bring the person back to the hospital. The problems that have occurred with this are the same sort that are addressed in Foucha v. Louisiana.

In some instances, district courts have used the conditional release provision to revoke a release into the community based upon activity which had nothing to do with the person's mental illness. For example, a former patient who had been released to a community was picked up for violation of drug laws. His mental illness was not a factor in him violating statutes dealing with dangerous drugs. Rather than prosecuting the person for a crime and sending the person to prison, it was easier for the court and the county attorney to revoke the conditional release and to send him back to the Montana State Hospital. Again, that is unconstitutional under the Foucha decision. Such revocation or recommitment is not constitutional unless the person is a danger and that danger is caused by the person's mental illness.

The changes to the statutes in this area will eliminate the possibility of abuse since they will provide that judges cannot repeatedly release someone and leave them out for nearly five years and then simply revoke based upon some conduct which is a violation of the terms of release. If the violation is caused by the person's mental illness and it demonstrates that the person is in fact dangerous, such revocation is appropriate. However, unless

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HB 255

Testimony of Kimberly A. Kradolfer: HB 255
Page 7
March 4, 1993

dangerousness can be tied directly to the illness, other criminal proceedings would be more appropriate than recommitment.

Additionally, if someone has been conditionally released, more than five years has passed from his original commitment to the hospital, and most of that time has been spent on community release without incident, it is more appropriate to simply commit him civilly on a new commitment under the regular commitment statutes if the status of his mental illness warrants commitment. To simply hold a prior criminal charge over someone's head for an indeterminate period of time and to use that as a means of maintaining control over the person is not permissible in light of the Foucha v. Louisiana decision.

6. Lawsuit: Houghton v. State of Montana

On January 7, 1993, based upon the holding in Foucha v. Louisiana decision, a lawsuit was filed by eight named patients at Montana State Hospital who have been committed after acquittal based upon mental disease and defect. Those patients filed suit on behalf of themselves and all others similarly situated to request an injunction against enforcement of Montana's current statutes. They request the relief which this bill would afford. I would note that the hospital staff have identified a ninth patient who falls into this category.

It is the position of the Montana Mental Health Planning and Advisory Council that this bill will establish the standards

Testimony of Kimberly A. Kradolfer: HB 255
Page 8
March 4, 1993

required by Foucha. It will also structure the recommitment process to allow a higher degree of scrutiny in more serious cases (where an act involved "substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage"). It also provides a means for continued input from the original county attorney and district court judge. This is therefore a more desirable approach than simply imposing an injunction which leaves questions about the procedures which should be followed, who has standing to appear, the standards which apply, and how recommitment review should be triggered.

Conclusion

The Montana Mental Health Planning and Advisory Council has reviewed this area extensively and has sought input from the hospital, local community mental health providers, the Board of Visitors for Mental Disabilities, and from people working in the criminal justice system. I would urge this committee's thoughtful consideration of this bill and that the committee issue a "Do Pass" recommendation. Thank you.

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Testimony on HB 255 by

February 19, 1993

Dan Anderson, Administrator
Mental Health Division
Department of Corrections & Human Services

HB 255 was drafted by a committee established by the Mental Health Planning and Advisory Council. The Planning and Advisory Council is a group made up of representatives of a variety of state agencies, consumers of mental health services, family members of consumers of mental health services, and providers of mental health services. The original goal of the council in drafting this legislation was to assure that when the Montana State Hospital is used as a resource for the criminal justice system, that it is used as a treatment resource and not simply as a site of incarceration of people who have committed criminal acts.

Ironically during the time this committee was deliberating to try to develop legislation, the United States Supreme Court made its ruling in the Foucha v. Louisiana case. The decision in the Foucha case is consistent with the goal of the advisory council. That is, that persons who have been found not guilty by reason of mental disease or defect should be confined to the state hospital or other treatment facility only for so long as their mental disorder causes them to be a danger to themselves or to the community.

HB 255 will bring Montana's statute on the review of patients found not guilty by reason of mental disease and defect into compliance with the United States Constitution as interpreted by the Supreme Court. This bill requires an annual clinical review of these patients to determine whether they continue to meet the standard required to keep them in the State Hospital or other treatment facility. The bill allows the Department or the mentally ill person to, on an annual basis, request of the court discharge or conditional release. During such a hearing for discharge or conditional release the burden to prove that the person continues to be dangerous is on the state as required under the Foucha decision.

HB 255 also makes four other changes in how people with mental illnesses who are in the criminal justice system are dealt with.

First, the bill would transfer authority for dealing with a person found not guilty by reason of mental disease or defect, when the defect is a developmental disability, to civil court for consideration through the normal civil commitment process for developmental disabilities.

Second, the bill would give authority to the director of the department rather than the superintendent of the State Hospital to make a determination of where a person found not guilty by reason of mental disease or defect can best be served.

Third, the bill changes how a mentally ill individual seeking discharge is evaluated. Current law requires two psychiatrists or psychologists to evaluate the person. Under HB 255, the court will appoint one psychiatrist or psychologist and the person with mental illness has the option of asking for a second independent evaluation. This procedure is consistent with what is currently in practice in civil commitment and re-commitment procedures.

Finally, the bill also makes some changes to the criteria which can be used to ask for a review of a person who has been found guilty of a crime but sentenced to the treatment facility rather than to the state prison. The changes would allow the department to bring a case before a judge for consideration of a change in the sentence when the department and the State Hospital believe that further use of the State Hospital for treatment and confinement is either not appropriate or will not benefit the individual.

One of our department's primary objectives over the past several years has been to focus and strengthen the mission of the Montana State Hospital as a treatment resource providing active treatment for people with serious mental illnesses. Part of that focusing activity is to do what we can to assure that people who do not require active treatment are served elsewhere. HB 255, brings Montana's statute into compliance with the Supreme Court's ruling in the Foucha case. In doing so it also better defines the mental health system's role as a resource within the criminal justice system. We believe that the mental health system has an important role to play in the criminal justice system. That role is one of providing treatment for those who need treatment and we believe that with passage of HB 255, that role is better defined in state law.

22

The bill, as originally prepared, required that hearings concerning discharge and conditional releases of people found not guilty by reason of mental disease be held in the court serving the district in which the person was being treated. In most cases, this would be the Third Judicial District which serves Warm Springs.

Representative Liz Smith prepared an amendment which would keep jurisdiction with the original committing court unless that court transfers jurisdiction. Unfortunately, due to some miscommunication, the amendment was made only for the automatic 180 day hearing and not for subsequent requests for discharge or conditional release.

I have prepared amendments to complete what I believe to be the intent of Representative Smith's amendment - to retain jurisdiction for all requests for discharge or conditional release with the original court unless that court transfers jurisdiction.

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3-4-93
HB 255

DATE 3-4-93

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 68 Fagg HB 134 Peterson
HB 151 Vogel HB 255 Anderson

Name	Representing	Bill No.	Check One	
			Support	Oppose
Dan Anderson	DCHS - MH	255	X	
Kim Kudo Cer	MT Mental Health Planning + Advisory Council	255	X	
George Schunk		151	X	
Beth Baker	Dept of Justice	151	✓	
Col Bob Griffith	Dept of Justice	134	✓	
Gene Kiser	MBCC	134	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

MINUTES

**MONTANA SENATE
53rd LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By Senator Bill Yellowtail, on March 8, 1993, at
10:10 a.m.

ROLL CALL

Members Present:

Sen. Bill Yellowtail, Chair (D)
Sen. Steve Doherty, Vice Chair (D)
Sen. Sue Bartlett (D)
Sen. Chet Blaylock (D)
Sen. Bob Brown (R)
Sen. Bruce Crippen (R)
Sen. Eve Franklin (D)
Sen. Lorents Grosfield (R)
Sen. Mike Halligan (D)
Sen. John Harp (R)
Sen. David Rye (R)
Sen. Tom Towe (D)

Members Excused: NONE

Members Absent: NONE

Staff Present: Valencia Lane, Legislative Council
Rebecca Court, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 502
HB 409
HB 555
Executive Action: HB 502
HB 134
HB 255
HB 429
HB 582

HEARING ON HB 409

Opening Statement by Sponsor:

Representative Pavlovich, District 70, told the Committee HB 409
was requested by the Clerks of Court. HB 121 is an act requiring

Closing by Sponsor:

Rep. Barnett submitted a letter. (Exhibit #3)

EXECUTIVE ACTION ON HB 502

Motion/Vote:

Senator Towe moved HB 502 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 255

Discussion:

Valencia Lane explained the amendments. (Exhibit #4)

Motion:

Senator Towe moved amendment 1 and amendment 13.

Discussion:

Senator Franklin asked Ms. Lane about the burden of proof.

Vote:

The motion CARRIED UNANIMOUSLY.

Motion/Vote:

Senator Towe moved amendments 8 through 10 and amendments 23 and 24. The motion CARRIED UNANIMOUSLY.

Motion/Vote:

Senator Towe moved amendments 2 through 7, amendment 11, amendments 14 through 22, and amendments 25 through 27. The motion CARRIED UNANIMOUSLY.

Motion/Vote:

Senator Towe moved HB 255 BE CONCURRED IN AS AMENDED. The motion CARRIED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 429

Discussion:

Valencia Lane told the Committee that Senator Doherty asked for a one word amendment. Page 2, line 24, following "weight of the" insert "dry".

ROLL CALL

SENATE COMMITTEE

Judiciary

DATE 3-8-93

NAME	PRESENT	ABSENT	EXCUSED
Senator Yellowtail	X		
Senator Doherty	X		
Senator Brown	X		
Senator Crippen	X		
Senator Grosfield	X		
Senator Halligan	X		
Senator Harp	X		
Senator Towe	X		
Senator Bartlett	X		
Senator Franklin	X		
Senator Blaylock	X		
Senator Rye	X		

FC8

Attach to each day's minutes

Amendments to House Bill No. 255 SENATE JUDICIARY COMMITTEE
Third Reading Copy (BLUE)

For the Committee on Judiciary

Prepared by Valencia Lane
March 5, 1993

EXHIBIT NO. 4
DATE 3-8-93
BILL NO. HB255

1. Page 5, lines 3 and 4.
Following: "~~defendant~~" on line 3
Strike: remainder of line 3 through "services" on line 4
Insert: "state"
2. Page 5, line 8.
Following: "risk of"
Insert: ":"
(a) "
3. Page 5, line 9.
Strike: "of"
Insert: ";"
(b) "
4. Page 5, line 10.
Following: "others"
Strike: "1"
Insert: " ";"
5. Page 5, line 11.
Strike: "of"
Insert: "(c) "
6. Page 6, line 12.
Following: "1"
Insert: "a substantial risk"
7. Page 6, line 13.
Following: "or"
Insert: "a substantial risk"
8. Page 6, line 17.
Following: "~~committed~~"
Insert: "by which the person was committed unless that court
transfers jurisdiction to the court"
9. Page 6, lines 20 and 21.
Following: "committed" on line 20
Strike: remainder of line 20 through "person" on line 21
10. Page 6, line 22 through page 7, line 5.
Strike: subsection (2) in its entirety
Renumber: subsequent subsections
11. Page 8, line 19.

Following: "1"
Insert: "a substantial risk"

12. Page 8, line 20.
Following: "or"
Insert: "a substantial risk"

13. Page 8, lines 22 and 23.
Following: "discharge" on line 22
Strike: remainder of line 22 through "necessary" on line 23

14. Page 8, line 24.
Following: "(7)"
Insert: "(a)"

15. Page 9, line 3.
Following: "risk of"
Insert: ":"
(i)"

16. Page 9, line 4.
Following: "others"
Strike: "of"
Insert: ";"
(ii)"

17. Page 9, line 5.
Following: "others"
Strike: "1"
Insert: ";"
Following: "or"
Strike: "of"
Insert: "(iii)"

18. Page 9, line 6.
Following: "."
Insert: "(b)"

19. Page 9, line 12.
Following: "risk of"
Insert: ":"
(i)"

20. Page 9, line 13.
Following: "others"
Strike: "of"
Insert: ";"
(ii)"

21. Page 9, line 14.
Following: "others"
Strike: "1"
Insert: ";"
Following: "or"
Strike: "of"

Insert: "(iii)"

22. Page 9, line 15.

Following: "."

Insert: "(c)"

23. Page 10, line 1.

Following: "to"

Strike: "in"

Insert: "to"

24. Page 10, line 2.

Following: "~~committed,~~"

Insert: "by which the person was committed unless that court
transfers jurisdiction to the court"

25. Page 11, line 5.

Following: "risk of"

Insert: ":"
(a) "

26. Page 11, line 6.

Following: "others"

Strike: ", of"

Insert: ";"
(b) "

27. Page 11, line 7.

Following: "others"

Strike: ","

Insert: ";

Following: "or"

Strike: "of"

Insert: "(c)"

EXHIBIT 4
DATE 3-8-93
HB 255

SENATE STANDING COMMITTEE REPORT

Page 2 of 4
March 8, 1993

Page 1 of 4
March 8, 1993

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 255 (first reading copy -- blue), respectfully report that House Bill No. 255 be amended as follows and as so amended be concurred in.

Signed: Wm. Yellowtail
Senator William "Bill" Yellowtail, Chair

That such amendments read:

1. Page 5, lines 3 and 4.
Following: "~~defendant~~" on line 3
Strike: remainder of line 3 through "services" on line 4
Insert: "state"
2. Page 5, line 8.
Following: "risk of"
Insert: ":(a)"
3. Page 5, line 9.
Strike: ", of"
Insert: ":(b)"
4. Page 5, line 10.
Following: "others"
Strike: ", of"
Insert: ":(c)"
5. Page 5, line 11.
Strike: "of"
Insert: ":(c)"
6. Page 6, line 12.
Following: ", of"
Insert: "a substantial risk"
7. Page 6, line 13.
Following: "or"
Insert: "a substantial risk"
8. Page 6, line 17.
Following: "committed"
Insert: "by which the person was committed unless that court transfers jurisdiction to the court"

9. Page 6, lines 20 and 21.
Following: "committed" on line 20
Strike: remainder of line 20 through "person" on line 21
10. Page 6, line 22 through page 7, line 5.
Strike: subsection (2) in its entirety
Renumber: subsequent subsections
11. Page 8, line 19.
Following: ", of"
Insert: "a substantial risk"
12. Page 8, line 20.
Following: "or"
Insert: "a substantial risk"
13. Page 8, lines 22 and 23.
Following: "discharge" on line 22
Strike: remainder of line 22 through "necessary" on line 23
14. Page 8, line 24.
Following: "(7)"
Insert: ":(a)"
15. Page 9, line 3.
Following: "risk of"
Insert: ":(i)"
16. Page 9, line 4.
Following: "others"
Strike: ", of"
Insert: ":(ii)"
17. Page 9, line 5.
Following: "others"
Strike: ", of"
Insert: ":(iii)"
18. Page 9, line 6.
Following: ", of"
Insert: ":(b)"
19. Page 9, line 12.

Amd. Coord.
Sec. of Senate

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Senator Carrying Bill

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SENATE
HB 255
521241SC.San.

Following: "risk of"
Insert: ":"
(i)"

Strike: "of"
Insert: "(c)"

-END-

20. Page 9, line 13.
Following: "others"
Strike: "of"
Insert: ";"
(ii)"

21. Page 9, line 14.
Following: "others"
Strike: "of"
Insert: ";"
Following: "or"
Strike: "of"
Insert: "(iii)"

22. Page 9, line 15.
Following: "."
Insert: "(c)"

23. Page 10, line 1.
Following: "to"
Strike: "in"
Insert: "to"

24. Page 10, line 2.
Following: "committed,"
Insert: "by which the person was committed unless that court
transfers jurisdiction to the court"

25. Page 11, line 5.
Following: "risk of"
Insert: ":"
(a)"

26. Page 11, line 6.
Following: "others"
Strike: "of"
Insert: ";"
(b)"

27. Page 11, line 7.
Following: "others"
Strike: "of"
Insert: ";"
Following: "or"

3

1 HOUSE BILL NO. 255

2 INTRODUCED BY ANDERSON

3 BY REQUEST OF THE DEPARTMENT OF CORRECTIONS

4 AND HUMAN SERVICES

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE CRITERIA
7 APPLICABLE TO THE CONDITIONAL RELEASE OR DISCHARGE OF A
8 PERSON WHO HAS RELIED UPON THE DEFENSE OF MENTAL DISEASE OR
9 DEFECT; PROVIDING FOR A DIAGNOSIS OF SERIOUSLY
10 DEVELOPMENTALLY DISABLED IN EXAMINATION REPORTS; REVISING
11 THE HEARING PROCEDURE; AMENDING SECTIONS 46-14-206,
12 46-14-301, 46-14-302, 46-14-303, 46-14-304, AND 46-14-312,
13 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 Section 1. Section 46-14-206, MCA, is amended to read:

17 "46-14-206. Report of examination. (1) A report of the
18 examination may must include the following:

19 (a) a description of the nature of the examination;

20 (b) a diagnosis of the mental condition of the
21 defendant, including an opinion as to whether the defendant
22 is seriously mentally ill, as defined in 53-21-102, or is
23 seriously developmentally disabled, as defined in 53-20-102;

24 (c) if the defendant suffers from a mental disease or
25 defect, an opinion as to the defendant's capacity to

1 understand the proceedings against the defendant and to
2 assist in the defendant's own defense;

3 (d) when directed by the court, an opinion as to the
4 capacity of the defendant to have a particular state of mind
5 that is an element of the offense charged; and

6 (e) when directed by the court, an opinion as to the
7 capacity of the defendant, because of a mental disease or
8 defect, to appreciate the criminality of the defendant's
9 behavior or to conform the defendant's behavior to the
10 requirement of the law.

11 (2) If the examination cannot be conducted by reason of
12 the unwillingness of the defendant to participate in the
13 examination, the report must state that fact and must
14 include, if possible, an opinion as to whether the
15 unwillingness of the defendant was the result of mental
16 disease or defect."

17 Section 2. Section 46-14-301, MCA, is amended to read:

18 "46-14-301. Commitment upon finding of not guilty by
19 reason of lack of mental state -- hearing to determine
20 release or discharge. (1) When a defendant is found not
21 guilty for the reason that due to a mental disease or defect
22 the defendant could not have a particular state of mind that
23 is an essential element of the offense charged, the court
24 shall order a predisposition investigation in accordance
25 with 46-18-112 and 46-18-113, which must include an

1 investigation of the present mental condition of the
2 defendant. If the trial was by jury, the court shall hold a
3 hearing to determine the appropriate disposition of the
4 defendant. If the trial was by the court, the court may hold
5 a hearing to obtain any additional testimony it considers
6 necessary to determine the appropriate disposition of the
7 defendant. In either case, the testimony and evidence
8 presented at the trial must be considered by the court in
9 making its determination.

10 ~~{2}--The court, upon finding that the defendant may not~~
11 ~~be discharged or released without danger to others, shall~~
12 ~~order the defendant committed to the custody of the~~
13 ~~superintendent of the Montana state hospital to be placed in~~
14 ~~an appropriate institution for custody, care, and treatment.~~

15 (2) The court shall evaluate the nature of the offense
16 with which the defendant was charged. If the offense:

17 (a) involved a substantial risk of serious bodily
18 injury or death, actual bodily injury, or substantial
19 property damage, the court may find that the defendant
20 suffers from a mental disease or defect that renders the
21 defendant a danger to the defendant or others. If the court
22 finds that the defendant presents a danger to the defendant
23 or others, the defendant may be committed to the custody of
24 the director of the department of corrections and human
25 services to be placed in an appropriate mental health

1 facility for custody, care, and treatment. However, if the
2 court finds that the defendant is seriously developmentally
3 disabled, as defined in 53-20-102, the prosecutor shall
4 petition the court in the manner provided in Title 53,
5 chapter 20.

6 (b) charged did not involve a substantial risk of
7 serious bodily injury or death, actual bodily injury, or
8 substantial property damage, the court shall release the
9 defendant. The prosecutor may petition the court in the
10 manner provided in Title 53, chapter 20 or 21.

11 (3) A person committed to the custody of the
12 superintendent director of the department of corrections and
13 human services shall must have a hearing within 180 days of
14 confinement to determine the person's present mental
15 condition and whether the person may must be discharged or
16 released without danger to others or whether the commitment
17 may be extended because the person continues to suffer from
18 a mental disease or defect that renders the person a danger
19 to the person or others. The hearing must be conducted by
20 the court--that--ordered--the--commitment--unless--that--court
21 transfers jurisdiction to--the--third--judicial COURT THAT
22 ORDERED THE COMMITMENT UNLESS THAT COURT TRANSFERS
23 JURISDICTION TO THE district court in the district in which
24 the person has been placed. The court shall cause notice of
25 the hearing to be served upon the person, the person's

1 counsel, and the prosecutor, and the court that originally
 2 ordered the commitment. The hearing is a civil proceeding,
 3 and the burden is upon the defendant department--of
 4 corrections--and--human--services STATE to prove by a
 5 preponderance--of-the clear and convincing evidence that the
 6 defendant person may not be safely released because the
 7 person continues to suffer from a mental disease or defect
 8 that causes the person to present a substantial risk of:

9 (A) serious bodily injury or death to the person or
 10 others;--of;

11 (B) an imminent threat of physical injury to the person
 12 or others; or of

13 (C) substantial property damage.

14 (4) According to the determination of the court upon
 15 the hearing, the defendant person must be discharged or
 16 released on conditions the court determines to be necessary
 17 or must be committed to the custody of the superintendent-of
 18 the-Montana-state-hospital director of the department of
 19 corrections and human services to be placed in an
 20 appropriate institution mental health facility for custody,
 21 care, and treatment.

22 (5) A professional person shall review the status of
 23 the person each year. At the time of the annual review, the
 24 director of the department of corrections and human services
 25 or the person or the representative of the person may

1 petition for discharge or release of the person. Upon
 2 request for a hearing, a hearing must be held pursuant to
 3 the provisions of subsection (3)."

4 **Section 3.** Section 46-14-302, MCA, is amended to read:

5 "46-14-302. Discharge or release upon motion of
 6 superintendent director. (1) If the superintendent-of-the
 7 Montana--state--hospital director of the department of
 8 corrections and human services believes that a person
 9 committed to the superintendent's director's custody under
 10 46-14-301 may be discharged or released on condition without
 11 danger to the person or others because the person no longer
 12 suffers from a mental disease or defect that causes the
 13 person to present a substantial risk of serious bodily
 14 injury or death to the person or others, A SUBSTANTIAL RISK
 15 of an imminent threat of physical injury to the person or
 16 others, or A SUBSTANTIAL RISK of substantial property
 17 damage, the superintendent director shall make application
 18 for the discharge or release of the person in a report to
 19 the district court by--which--the-person-was-committed BY
 20 WHICH THE PERSON WAS COMMITTED UNLESS THAT COURT TRANSFERS
 21 JURISDICTION TO THE COURT in the district in which the
 22 person has been placed and shall send a copy of the
 23 application and report to the prosecutor of the county from
 24 which the defendant person was committed and--to--the--court
 25 that-originally-committed-the-person.

~~{2}--The--county--attorney--and--the--judge--who--originally
committed--the--person--may--transmit--to--the--court--statements--of
their--reasons--for--requesting--or--granting--the--original
commitment--and--shall--transmit--the--statements--within--7--days
if--requested--to--do--so--by--the--presiding--court--The--county
attorney--and--the--judge--who--originally--committed--the--person
must--be--given--the--opportunity--to--request--a--hearing--on--the
requested--release--of--the--person--and--to--appear--at--the
hearing--~~

~~{3}{2}~~ Either the director of the department of corrections and human services or the person may also make application to the court for discharge or release as part of the person's annual treatment review.

~~{2}{4}{3}~~ The court shall then appoint at least two persons one person who are is either a qualified psychiatrist psychiatrist or licensed clinical psychologists psychologist to examine the person and to report ~~their--opinion~~ as to the person's mental condition within 60 days or a longer period that the court determines to be necessary for the purpose. To facilitate the examinations and the proceedings on the examinations, the court may have the person confined in any institution mental health facility located near the place where the court sits that may be designated by the ~~superintendent--of--the--Montana~~ state-hospital director of the department of corrections and

human services as suitable for the temporary detention of irresponsible persons suffering from mental disease or defect.

~~{5}{4}~~ The committed person or the person's attorney may secure a professional person of the committed person's choice to examine the committed person and to testify at the hearing. If the person wishing to secure the testimony of a professional person is unable to do so because of financial reasons, the court shall appoint an additional professional person to perform the examination. Whenever possible, the court shall allow the committed person or the person's attorney a reasonable choice of an available professional person qualified to perform the requested examination. The professional person must be compensated by the department of corrections and human services.

~~{3}{6}{5}~~ If the court is satisfied by the report filed under subsection (1) and the testimony of the reporting psychiatrist or licensed clinical psychologist that the committed person may be discharged or released on condition without--danger--to--the--person--or--others because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, A SUBSTANTIAL RISK of an imminent threat of physical injury to the person or others, or A SUBSTANTIAL RISK of substantial property

1 damage, the court shall order the person's discharge or
2 ~~release--on--conditions--that--the--court--determines--to-be~~
3 ~~necessary.~~

4 ~~(4)(7)(6)~~ (A) If the court is not satisfied, it shall
5 promptly order a hearing to determine whether the person may
6 safely be discharged or released on the grounds that the
7 person no longer suffers from a mental disease or defect
8 that causes the person to present a substantial risk of:

9 (I) serious bodily injury or death to the person or
10 others; or;

11 (II) an imminent threat of physical injury to the person
12 or others; or of

13 (III) substantial property damage.

14 (B) A hearing is considered a civil proceeding, and the
15 burden is upon the ~~committed-person~~ state to prove by a
16 ~~preponderance--of-the~~ clear and convincing evidence that the
17 person may not be safely be discharged or released because
18 the person continues to suffer from a mental disease or
19 defect that causes the person to present a substantial risk
20 of:

21 (I) serious bodily injury or death to the person or
22 others; or;

23 (II) an imminent threat of physical injury to the person
24 or others; or of

25 (III) substantial property damage.

1 (C) According to the determination of the court upon
2 the hearing, the committed person must then be discharged or
3 released on conditions that the court determines to be
4 necessary or must be recommitted to the custody of the
5 ~~superintendent-of-the-Montana-state-hospital~~ director of the
6 department of corrections and human services, subject to
7 discharge or release only in accordance with the procedures
8 provided in this section and 46-14-303."

9 **Section 4.** Section 46-14-303, MCA, is amended to read:

10 "46-14-303. Application for discharge or release by
11 committed person. A committed person may make application
12 for discharge or release to in TO the district court by
13 ~~which--the--person--was--committed,~~ BY WHICH THE PERSON WAS
14 COMMITTED UNLESS THAT COURT TRANSFERS JURISDICTION TO THE
15 COURT in the district in which the person has been placed,
16 and the procedure to be followed upon the application is the
17 same as that prescribed in 46-14-302 in the case of an
18 application by the ~~superintendent--of--the--Montana-state~~
19 ~~hospital~~ director of the department of corrections and human
20 services. However, an application by a committed person need
21 not be considered until the person has been confined for a
22 period of not less than 6 months from the date of the order
23 of commitment, and if the determination of the court is
24 adverse to the application, the person may not be permitted
25 to file a further application until 1 year has elapsed from

1 the date of any preceding hearing on an application for the
2 person's release or discharge."

3 **Section 5.** Section 46-14-304, MCA, is amended to read:

4 "46-14-304. Recommitment----after Revocation of
5 conditional release. (1) If--within--5--years--after--the
6 conditional--release--of--a--committed--person The court may
7 order revocation of a person's conditional release if the
8 court determines after hearing evidence that:

9 (a) the conditions of release have not been fulfilled;
10 and

11 (b) that-for-the-safety-of-the-person-or-for-the-safety
12 of--others--the--person's--conditional--release--should---be
13 revoked, based on the violations of the conditions and the
14 person's past mental health history, there is a substantial
15 likelihood that the person continues to suffer from a mental
16 disease or defect that causes the person to present a
17 substantial risk of:

18 (I) serious bodily injury or death to the person or
19 others; or;

20 (II) an imminent threat of physical injury to the person
21 or others; or of

22 (III) substantial property damage.

23 (2) The court may retain jurisdiction to revoke a
24 conditional release for no longer than 5 years.

25 (3) If the court finds that the conditional release

1 should be revoked, the court shall immediately order the
2 person to be recommitted to the custody of the
3 superintendent-of-the-Montana-state-hospital director of the
4 department of corrections and human services, subject to
5 discharge or release only in accordance with the procedures
6 provided in 46-14-302 and 46-14-303."

7 **Section 6.** Section 46-14-312, MCA, is amended to read:

8 "46-14-312. Sentence to be imposed. (1) If the court
9 finds that the defendant at the time of the commission of
10 the offense of which the defendant was convicted did not
11 suffer from a mental disease or defect as described in
12 46-14-311, the court shall sentence the defendant as
13 provided in Title 46, chapter 18."

14 (2) If the court finds that the defendant at the time
15 of the commission of the offense suffered from a mental
16 disease or defect as described in 46-14-311, any mandatory
17 minimum sentence prescribed by law for the offense need not
18 apply and the court shall sentence the defendant to be
19 committed to the custody of the director of the department
20 of corrections and human services to be placed in an
21 appropriate institution for custody, care, and treatment for
22 a definite period of time not to exceed the maximum term of
23 imprisonment that could be imposed under subsection (1). The
24 authority of the court with regard to sentencing is the same
25 as authorized in Title 46, chapter 18, if the treatment of

1 the individual and the protection of the public are provided
2 for.

3 (3) Either the director or a defendant whose sentence
4 has been imposed under subsection (2) may petition the
5 sentencing court for review of the sentence if the
6 professional person certifies that:

7 (a) the defendant no longer suffers from a mental
8 disease or defect;

9 (b) the defendant's mental disease or defect no longer
10 renders him the defendant unable to appreciate the
11 criminality of his the defendant's conduct or to conform his
12 the defendant's conduct to the requirements of law; or

13 (c) the defendant suffers from a mental disease or
14 defect but is not a danger to the defendant or others; or

15 ~~(c)~~ (d) the defendant suffers from a mental disease or
16 defect that makes him the defendant a danger to himself the
17 defendant or others, but either:

18 (i) there is no treatment available for his the mental
19 disease or defect;

20 (ii) or--he the defendant refuses to cooperate with
21 treatment; or

22 (iii) the defendant will no longer benefit from active
23 inpatient treatment for the mental disease or defect.

24 (4) The sentencing court may make any order not
25 inconsistent with its original sentencing authority except

1 that the length of confinement or supervision must be equal
2 to that of the original sentence. The professional person
3 shall review the defendant's status each year."

4 NEW SECTION. **Section 7.** Effective date. [This act] is
5 effective on passage and approval.

-End-